

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, an
unincorporated association,

Plaintiff,

v.

STATE OF ALASKA, DIVISION OF
ELECTIONS, and GAIL FENUMIAI,
DIRECTOR, STATE OF ALASKA,
DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-19-10903 CI

STAND TALL WITH MIKE, an
independent expenditure group,

Intervenor.

AFFIDAVIT OF SCOTT M. KENDALL

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Scott M. Kendall, being first duly sworn and deposed, hereby states as follows:

- 1) I am counsel for Plaintiff Recall Dunleavy in this case.
- 2) Exhibit 1 is a true and correct copy of the Statement of Grounds included in each recall application booklet, which 46,405 qualified Alaskans signed.
- 3) Exhibit 2 is a true and correct copy of Attorney General Kevin G. Clarkson's opinion on the legal sufficiency of Plaintiff's recall application, without the attached transcript of then-Judge Craig Stowers' oral decision in *Citizens for Ethical*

Government v. State. That order has been included as part of Recall Dunleavy's motion for summary judgment, and is attached as Plaintiff's Appendix C.

4) Exhibit 3 is a true and correct copy of Gail Fenumiai's letter concerning the status of Recall Dunleavy's recall application on November 4, 2019.

5) Exhibit 4 is a true and correct copy of Governor Michael J. Dunleavy's press release from March 21, 2019, as found on his official press release website.¹

6) Exhibit 5 is a true and correct copy of Governor Dunleavy's letter to the Alaska Judicial Council dated March 20, 2019, as found linked to his press release.²

7) Exhibit 6 is a true and correct copy of Governor Dunleavy's press release from March 27, 2019, as found on his official press release website.³

¹ See Press Release, Governor Michael J. Dunleavy, Governor Announces Four New Judges, Declines to Fill Vacant Seat Without Additional Information from Judicial Council (Mar. 21, 2019), <https://gov.alaska.gov/newsroom/2019/03/21/governor-announces-four-new-judges-declines-to-fill-vacant-seat-without-additional-information-from-judicial-council/>.

² See Letter from Governor Michael J. Dunleavy to the Alaska Judicial Council (Mar. 20, 2019), <https://gov.alaska.gov/wp-content/uploads/sites/2/03202019-Alaska-Judicial-Council.pdf>.

³ See Press Release, Governor Michael J. Dunleavy, Governor Comments on Judicial Nomination Process Following "Fruitful and Productive" Meeting with Chief Justice Bolger (Mar. 27, 2019), <https://gov.alaska.gov/newsroom/2019/03/27/governor-comments-on-judicial-nomination-process-following-fruitful-and-productive-meeting-with-chief-justice-bolger/>.

8) Exhibit 7 is a true and correct copy of relevant “Restore the PFD” Facebook pages and ad library information as they existed on October 24, 2019, and November 11, 2019.⁴

9) Exhibit 8 is a true and correct copy of relevant “Repeal SB 91” Facebook pages and ad library information as they existed on October 24, 2019.⁵

10) Exhibit 9 is a true and correct copy of relevant “Cap Government Spending” Facebook pages and ad library information as they existed on October 24, 2019, and November 11, 2019.⁶

11) Exhibit 10 is a true and correct copy of Representative Sara Rasmussen’s letter of intent from the Alaska Public Offices Commission (APOC) website, which was

⁴ See Restore the PFD (@RestorePFD), *About*, FACEBOOK, <https://www.facebook.com/pg/RestorePFD/about/> (last visited Nov. 4, 2019); Restore the PFD (@RestorePFD), *Ad Library*, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=616481278789881 (last visited Nov. 4, 2019); Restore the PFD (@RestorePFD), *Senator Giessel on the PFD*, FACEBOOK (May 7, 2019), <https://www.facebook.com/RestorePFD/videos/415826069240326/> (last visited Nov. 4, 2019); Restore the PFD (RestorePFD), FACEBOOK (May 23, 2019), <https://www.facebook.com/RestorePFD/photos/a.625577604546915/663360374101971/?type=3&theater> (last visited Nov. 11, 2019).

⁵ See Repeal SB 91 (@MakeAlaskaSafe), *About*, FACEBOOK, <https://www.facebook.com/pg/MakeAlaskaSafe/about/> (last visited Nov. 4, 2019); Repeal SB91 (@MakeAlaskaSafe), *Ad Library*, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&q=Repeal%20SB91&view_all_page_id=613601695770470 (last visited Nov. 4, 2019).

⁶ See Cap Government Spending (@CapSpending), *About*, FACEBOOK, <https://www.facebook.com/pg/CapSpending/about/> (last visited Nov. 4, 2019); Cap Government Spending (@CapSpending), *Ad Library*, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=2109316425853875 (last visited Nov. 11, 2019).

submitted on June 24, 2019.⁷ Exhibit 10 also includes a true and correct copy of then-Representative Josh Revak's letter of intent from the APOC website, which was submitted on June 13, 2019.⁸

12) Exhibit 11 is a true and correct copy of an email chain between Matt Shuckerow, Governor Dunleavy's then-Press Secretary, and Jeff Landfield of The Alaska Landmine.

13) Exhibit 12 are true and correct copies of photographs of campaign-style physical mailers which were sent in July 2019 to Alaskan voters in support of Senator Mia Costello and then-Representative Revak.

14) Exhibit 13 is a true and correct copy of a memorandum dated May 20, 2019 from the Legislative Affairs Agency's Division of Legal and Research Services concerning a Facebook ad paid for by Governor Dunleavy.

⁷ See Letter of Intent, Sara Rasmussen (submitted June 24, 2019), <https://aws.state.ak.us/ApocReports/Registration/LetterOfIntent/LOIForms.aspx> (type "06/23/19" in the "Filed After:" box, type "06/25/19" in the "Filed Before:" box, click the blue "Search" icon, and click the "Filed" hyperlink associated with "Sara Rasmussen").

⁸ Letter of Intent, Joshua C. Revak (submitted June 13, 2019), <https://aws.state.ak.us/ApocReports/Registration/LetterOfIntent/LOIForms.aspx> (type "11/02/19" in the "Filed After:" box, type "11/04/19" in the "Filed Before:" box, click the blue "Search" icon, and click the "Filed" hyperlink with two red asterisks associated with "Josh Revak," click the blue "View Previous" icon, and click another blue "View Previous" icon).

15) Exhibit 14 is a true and correct copy of page 122 from the State of Alaska, Office of Management and Budget veto change record detail for Governor Dunleavy's June 28, 2019 vetoes.⁹

16) Exhibit 15 is a true and correct copy of excerpts from a sworn affidavit by Donna Steward, Deputy Commissioner for Medicaid and Health Care Policy at the Alaska Department of Health and Social Services, dated August 2, 2019, and filed in *Alaska State Hospital & Nursing Home Association v. State*, 3AN-19-08244CI.

17) Exhibit 16 are true and correct copies of pages 20 and 21 of what was former House Bill 39—the legislature's appropriation bill—as amended by Governor Dunleavy's vetoes on June 28, 2019.¹⁰

18) Exhibit 17 is a true and correct copy of page 5 of what was former House Bill 2001—the legislature's appropriation bill from its second special session in 2019—as amended by Governor Dunleavy's vetoes on August 19, 2019.¹¹

⁹ STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO CHANGE RECORD DETAILS AT 122 (JUNE 28, 2019),

https://omb.alaska.gov/ombfiles/20_budget/FY20Enacted_cr_detail_6-28-19.pdf.

¹⁰ See Ch. 1, § 1, at 20-21, 1SSLA 2019 (as amended), https://omb.alaska.gov/ombfiles/20_budget/PDFs/HB39Bill_6-28-19.pdf.

¹¹ Ch. 2, § 1, at 5, 2SSLA 2019 (as amended), https://omb.alaska.gov/ombfiles/20_budget/PDFs/HB2001_Markup_8-19-19.pdf.

19) Exhibit 18 is a true and correct copy of page 27 from the State of Alaska, Office of Management and Budget veto change record detail for Governor Dunleavy's August 19, 2019 vetoes.¹²

20) On November 6, 2019, I spoke with Heather Hebdon, the Executive Director of APOC. Hebdon confirmed that an article posted on July 10, 2019 on The Alaska Landmine website summarizing what occurred with respect to mailers sent from the Governor's office was accurate.¹³ Hebdon told me that when APOC staff became aware of the Governor's Office's advertisements, they immediately recognized that there was an issue because they are ads of a type that must have certain disclosures required by law. Hebdon indicated that she contacted the Governor's Office directly, and told them that their advertisements violated the law by, at a minimum, failing to have a "paid for by" notification on them. To the best of her recollection, Hebdon believes this conversation was with Governor Dunleavy's then-Communications Director, Mary Ann Pruitt.

¹² STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, HB 2001 FY20 POST-VETO CHANGE RECORD DETAIL at 27 (Aug. 19, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/FY20_HB2001_Post_Veto_CR_Detail_8-19-19.pdf.

¹³ Jeff Landfield, *APOC Looking into Suspicious Mailers Support Rep. Josh Revak*, THE ALASKA LANDMINE (July 10, 2019), <https://alaskalandmine.com/landmines/apoc-looking-into-suspicious-mailers-supporting-rep-josh-revak/>; *see also* Jeff Landfield, *Gov. Dunleavy's Office Paid for Rep. Revak and Sen. Costello Mailers*, THE ALASKA LANDMINE (July 19, 2019), <https://alaskalandmine.com/landmines/gov-dunleavys-office-paid-for-rep-revak-and-sen-costello-mailers/> (confirming the accuracy of the July 10 article).

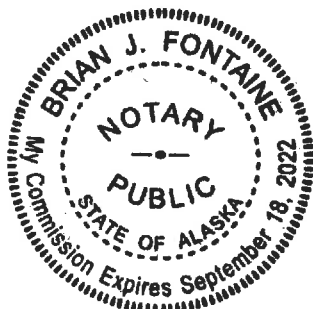
21) Hebdon told me that she did not fine or cite the Governor's Office because APOC has an "in house" policy of "one free pass" for first offenders if they cease their violations upon request. After her conversation with staff at the Governor's Office, Hebdon believes the Governor's Office stopped sending physical campaign-style mailers regarding public officials and candidates for office.


FURTHER AFFIANT SAYETH NAUGHT.



Scott M. Kendall

SUBSCRIBED AND SWORN to before me this 26th day of November 2019.





Notary Public in and for Alaska
My Commission Expires: 9-18-2022

CERTIFICATE OF SERVICE

I hereby certify that on this ___th day of
November 2019, a true and correct copy
of the foregoing was sent to the following
via hand delivery and e-mail:

Margaret Paton-Walsh
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov

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Brian Fontaine

Statement of Grounds:

Neglect of Duties, Incompetence, and/or Lack of Fitness, for the following actions:

- Governor Dunleavy **violated Alaska law** by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.
- Governor Dunleavy **violated Alaska Law and the Constitution, and misused state funds** by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters.
- Governor Dunleavy **violated separation-of-powers** by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.
- Governor Dunleavy **acted incompetently** when he **mistakenly vetoed** approximately \$18 million more than he told the legislature. In official communications he intended to strike. Uncorrected, the error would cause the state to lose over \$40 million in additional federal Medicaid funds.

References: AS 22.10.100; Art. IX, sec. 6 of Alaska Constitution; AS 39.52; AS 15.13, including .050, .090, .135, and .145; Legislative Council (31-LS1006); ch.1-2, FSSLA19; OMB Change Record Detail (Appellate Courts, University, AHFC, Medicaid Services).

Recall Michael J Dunleavy as Governor of Alaska.

By signing as a sponsor below, I affirm that I am a qualified voter in the State of Alaska and acknowledge that the name and office of the person to be recalled and the statement of grounds for recall was attached at the time I signed the signature page.

	Printed Name (Print Clearly)	Address City, State, Zip	Identifier (provide ONE) (Voter No., Date of Birth, last 4 digits of Social Security No., AK Driver's License No., AK ID Card No., or Voter ID No.)	Signature
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Main: (907) 269-5100
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November 4, 2019

Gail Fenumiai
Director of Elections
Alaska Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Re: *Review of Application for Recall of Governor Michael J. Dunleavy*
AGO No. 2019200686

Dear Director Fenumiai:

You have asked for the Department of Law's opinion regarding the application for recall of Governor Dunleavy that was received by your office on September 5, 2019. Alaska Statute 15.45.540 requires the director of the Division of Elections (Division) to review the application and either certify it or notify the recall committee of the grounds of refusal.

I. Summary of Opinion

The application complies with the technical requirements of the recall statutes.¹ The timely filed application names an elected official subject to recall and is accompanied by the required payment. But, because the statement of grounds for recall fails to satisfy the legal standards required for a recall, we recommend that certification of the application be denied.

¹ Alaska's recall process at the state level contains two stages: (1) the application process under AS 15.45.480–.550, and (2) the petition process under AS 15.45.560–.630. The recall process is generally referred to in terms of a “petition” for recall. Any references to “petition” in this opinion are the same as “application” for the purposes of reviewing the application and the statement of grounds.

II. Background

Governor Michael J. Dunleavy ("the Governor") was elected on November 6, 2018. On September 5, 2019, sponsors filed an application to recall the Governor. The application provides the following 158-word alleged grounds for recall:²

Neglect of Duties, Incompetence, and/or Lack of Fitness, for the following actions:

1. Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.
2. Governor Dunleavy violated Alaska Law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters.
3. Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.
4. Governor Dunleavy acted incompetently when he mistakenly vetoed approximately \$18 million more than he told the legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over \$40 million in additional federal Medicaid funds.

References: AS 22.10.100; Art. IX, sec. 6 of Alaska Constitution; AS 39.52; AS 15.13, including .050, .090, .135, and .145; Legislative Council (31-LS1006); ch.1–2, FSSLA19; OMB Change Record Detail (Appellate Courts, University, AHFC, Medicaid Services).

The application was accompanied by: (1) a \$100 deposit; (2) a statement that the sponsors are qualified voters; (3) a designation of a recall committee of three sponsors

² This is an approximate count, not including subsection letters such as (a) or (b), and with statutory citations treated as one word (i.e., "AS #"). If this references section is included in the word count, the statement of grounds would total 189 words. Either way, it is under 200 words.

who shall represent all persons who signed the application; (4) signatures of at least 100 qualified voters who subscribed to the application as sponsors; and (5) signatures and addresses of allegedly qualified voters equal to more than 10 percent of those who voted in the last general election.³ The statement of grounds for recall also references approximately 149 pages of additional material, including an Office of Management and Budget ("OMB") Change Record Detail consisting of 144 pages and a Legislative Division of Legal and Research Services Memorandum consisting of five pages. As discussed further below, because this material takes the statement of grounds far beyond the 200-word limit, it should not be considered for purposes of determining whether the grounds are factually and legally sufficient.

III. Applicable law

The law of recall in Alaska is found in (1) the Alaska Constitution, (2) Alaska statutes implementing recall and establishing the procedures and grounds for recall, and (3) court decisions from the Alaska Supreme Court. Decisions from the Alaska Superior Court are persuasive but not controlling authority.⁴ Additionally, prior opinions from the Department of Law and court decisions from other states can be helpful in interpreting Alaska's recall statutes.

A. The Alaska Constitution

Article XI, section 8 of the Alaska Constitution permits recall of all elected public officials in Alaska except judicial officers. The constitution does not set forth the procedures or grounds for recall, but instead empowers the legislature to establish them.

B. Alaska statutes

By statute, an application for recall must meet the following requirements:

- It must name a public official subject to recall: governor, lieutenant governor or state legislator. AS 15.45.470.

³ The Division of Elections reviewed the signatures and found that 46,405 of the signatures submitted were legible signatures that met the requirements of AS 15.45.500(3). The Department of Law has no role in the signature review process.

⁴ Among the three superior court decisions on state recall applications, we have given greater weight to the most recent case, Judge Stowers' decision in *Citizens for an Ethical Government v. State*, No. 3AN-05-12133CI (Alaska Super., Jan. 4, 2006) (Stowers, J.) (oral ruling on summary judgment), because Justice Stowers is now a member of the Alaska Supreme Court. For your convenience, a copy of the official transcript of Judge Stowers' decision is attached to this Opinion letter.

- It must be accompanied by a deposit of \$100. AS 15.45.480.
- It must be filed after the first 120 days in office and no later than 180 days before the last day in office of the official subject to recall. AS 15.45.490; AS 15.45.550(2).
- It must be in the proper form, which requires:
 1. the name and office of the person to be recalled;
 2. the grounds for recall described “in particular” in not more than 200 words;
 3. a statement that the sponsors are qualified voters who signed the application with the statement of grounds for recall attached;
 4. the designation of a recall committee of three sponsors who represent all the sponsors and subscribers;
 5. the signatures of at least 100 qualified voters who subscribe to the application as sponsors for purposes of circulation; and
 6. the signatures and addresses of qualified voters equal in number to 10 percent of those who voted in the preceding general election.

AS 15.45.500.

- It must adequately articulate at least one of the four legal grounds for recall:
 1. lack of fitness;
 2. incompetence;
 3. neglect of duties; or
 4. corruption.

AS 15.45.510.

As the Director of the Division, you are tasked with reviewing the application and you must either certify it, if it meets the technical and substantive requirements, or notify the

recall committee of the grounds for refusal to certify.⁵ Although the statutes do not specify a timeframe for completing your review, you requested our legal review be completed within sixty days, which falls on November 4, 2019.

IV. Standard of review

No decision of the Alaska Supreme Court has addressed the statutes governing recall of a state level official. The Supreme Court has, however, twice addressed the recall statutes for local officials found in AS 29.26, which differ from the grounds for recall of a state elected official.⁶ Superior court judges have, nonetheless, treated the Alaska Supreme Court's recall decisions regarding local officials to be controlling for recall applications of statewide officials.⁷

Some general rules of review are noteworthy at the outset. The reviewer⁸ of a recall application is to "avoid wrapping the recall process in such a tight straightjacket that a legally sufficient recall petition could be prepared only by an attorney who is a specialist in election law matters."⁹ The statement of grounds contained within the application must "give the officeholder a fair opportunity to defend his conduct in a rebuttal limited to 200 words."¹⁰ And the application must stand or fall based upon the words written by its sponsors—the reviewer cannot "rewrite the allegations of the petition in different language."¹¹ The reviewer is to "delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute."¹² This latter point is important because "[t]he right to recall . . . officials in

⁵ AS 15.45.540.

⁶ See *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287 (Alaska 1984); *von Stauffenberg v. The Committee for an Honest and Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995).

⁷ See *Coghill v. Rollins*, No. 4FA-92-1728CI (Alaska Super., 14, 1993) (Savell, J.); *Valley Residents for a Citizen Legislature v. State*, No. 3AN-04-6827CI (Alaska Super., Aug. 24, 2004) (Gleason, J.); *Citizens*, No. 3AN-05-12133CI (Stowers, J.).

⁸ We intend the word "reviewer" to refer to both you as the Director of the Division of Elections and the Department of Law as your legal advisor.

⁹ *Meiners*, 687 P.2d at 301.

¹⁰ *Id.* at 302.

¹¹ *Id.*

¹² *Id.* at 303.

Alaska is . . . limited to recall for cause”—i.e., absent “cause” (legal grounds for recall), there can be no recall.¹³

The grounds for recall in the application must be both factually and legally sufficient.¹⁴ The reviewer is to ensure that only factually and legally sufficient charges go to the voters.¹⁵ The reviewer should examine a recall application similar to how a court reviews a motion to dismiss a complaint for failure to state a claim.¹⁶ Applying this standard, the reviewer should take the factual allegations as true.¹⁷ The question for the reviewer is whether the facts, taken as true, constitute a prima facie showing of the grounds for recall. We discuss the standards for factual and legal sufficiency in more detail in the following sections.

A. Factual sufficiency

The factual allegations of an application must describe the conduct that constitutes the grounds for recall “in particular.”¹⁸ The reviewer of an application is “required to make at least a threshold determination as to whether what has been alleged is factually specific enough.”¹⁹ The purpose of the particularity requirement is to protect both the elected official and voters.²⁰ Factual allegations must fairly inform the electorate of the charges and allow the targeted official a reasonable opportunity to rebut the charges.²¹ As the Alaska Supreme Court explained in *von Stauffenberg* and *Meiners*, “[t]he purpose of the requirement of particularity is to give the officeholder a fair opportunity to defend his

¹³ *von Stauffenberg*, 903 P.2d at 1059; accord *Meiners*, 687 P.2d at 295; *In re Recall of Reed*, 124 P.3d 279, 281 (Wash. 2005) (“public officials are protected from petitions based on frivolous charges.”); *In re Recall of Call*, 749 P.2d 674, 676 (Wash. 1988) (“[t]he right to recall elected officials is limited to recall for cause so as to free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations.”).

¹⁴ See *von Stauffenberg*, 903 P.2d at 1059–60; see also *Reed*, 124 P.3d at 281; *In re Recall of Lee*, 859 P.2d 1244, 1247 (Wash. 1993).

¹⁵ *Reed*, 124 P.3d at 281.

¹⁶ *von Stauffenberg*, 903 P.2d at 1059.

¹⁷ *Id.*

¹⁸ AS 15.45.500(2); see also, e.g., *von Stauffenberg*, 903 P.2d at 1060; *Citizens*, No. 3AN-05-12133CI at 4–5.

¹⁹ *Citizens*, No. 3AN-05-12133CI at 12.

²⁰ *Meiners*, 687 P.2d at 302.

²¹ *von Stauffenberg*, 903 P.2d at 1060; see also 2004 Op. Att’y Gen. (Apr. 8, 2004) at 9 and n. 43.

conduct in a rebuttal limited to 200 words.”²² Allegations stated in overly general terms would leave the elected official incapable of defending himself and would lead some electors to sign a recall petition “with no idea of what words or acts of the official might have precipitated the recall effort.”²³ The factual allegations of a recall application must also specify some detail as to how the office holder personally committed or was personally responsible for the alleged conduct that constitutes the ground for recall.²⁴ “[T]here is ‘no authority for the proposition that a public official may be recalled for the act of a subordinate done without the official’s knowledge or direction.’”²⁵

We acknowledge that recall statutes are to be broadly construed such that substantial compliance by the sponsors with the established procedures is sufficient to meet the requirements. But if the statutes and the rulings of “the Supreme Court in *Meiners* and *von Stauffenberg* mean anything . . . a court is required to make at least a threshold determination as to whether what has been alleged is factually specific enough.”²⁶ In the superior court case of *Citizens for an Ethical Government v. State*, Judge Stowers warned that “[r]ecall advocates must allege more than mere conclusory statements or arguments, otherwise our recall process drifts to the end of the spectrum where simple disagreement with an officeholder’s position on questions of policy becomes sufficient ground in and of themselves.”²⁷ Disagreement with an elected official’s policies is not a valid basis for recall.²⁸

The reviewer may consider only the 200 or fewer words in the statement of grounds when considering a recall application. The sponsors of an application are not permitted to skirt the statutory 200-word limit by referencing or attaching additional

²² 903 P.2d at 1060 (quoting *Meiners*, 687 P.2d at 302).

²³ *Steadman v. Halland*, 641 P.2d 448, 453 (Mont. 1982).

²⁴ See, e.g., *Coghill*, No. 4FA-92-1728CI at 23–24 (Judge Savell found that an allegation to the effect that Lieutenant Governor Coghill had made unfounded public accusations of criminal activity of recall staff and had used his office to intimidate individuals who had challenged his nomination and election, was both factually and legally insufficient because it contained no details about the accusations and did not describe how the Lieutenant Governor had used his office to intimidate others).

²⁵ *Reed*, 124 P.3d at 281–82 (quoting *In re Recall of Morrisette*, 756 P.2d 1318, 1320 (Wash. 1988)).

²⁶ *Citizens*, No. 3AN-05-12133CI at 12.

²⁷ *Citizens*, No. 3AN-05-12133CI at 14; see also *Meiners*, 687 P.2d at 294; *Cole v. Webster*, 692 P.2d 799, 803 (Wash. 1984).

²⁸ *Meiners*, 687 P.2d at 294; *Citizens*, No. 3AN-05-12133CI at 14; *Cole*, 692 P.2d at 803.

documents and materials to the application.²⁹ Judge Stowers declined to review additional materials that were submitted to him and specifically limited his review to the precise words of the statement of grounds for recall contained within the recall application.³⁰ The 200-word limit for the statement of grounds must be strictly enforced because, in the event of a recall election, the elected official is limited to only 200 words in the rebuttal statement that is posted in polling places.³¹

B. Legal sufficiency

Unlike the deference given to the truth of factual allegations, the reviewer of a recall application must review legal allegations or legal conclusions *de novo* for their consistency with law. No deference is given to the sponsors' legal conclusions.³² This applies to (1) allegations that some action—the facts of which the reviewer assumes to be true—constitutes one of the statutory grounds for recall; and (2) allegations that some action that is foundational to the sponsor's claim is unlawful or has specific legal consequence.³³ Allegations that present mixed questions of law and fact are to be reviewed *de novo* for the truth or correctness of the legal assertions of the allegation. As Judge Stowers stated, “[t]o the extent that there are mixed questions of fact and law, A did B, which is illegal, then the validity of that statement in part turns on whether the statement of law is valid or not. And if it's not, it gets stricken.”³⁴ In order to define the grounds for recall, we must first review the history of the constitutional and statutory recall provisions.

The passage of Alaska's first recall statute followed close on the heels of the Alaska Constitutional Convention and was informed by the delegates' discussion of recall. In 1959, the newly created Alaska Legislature directed the Alaska Legislative

²⁹ *Citizens*, No. 3AN-05-12133CI at 4–5.

³⁰ *Id.* at 4–5; *see also Steadman*, 641 P.2d at 453 (explaining that the Montana Supreme Court would not consider a “Reasons for Recall” document that was attached to the petition).

³¹ AS 15.45.680.

³² *See von Stauffenberg*, 903 P.2d at 1059-60 and n.12 (stating that the Court's role is to “determine whether doing [an alleged action] was a violation of Alaska law”); *Meiners*, 687 P.2d at 301 (“If the petition alleges violation of totally non-existent laws, then it would not allege failure to perform prescribed duties.”); *Citizens*, No. 3AN-05-12133CI at 10–11 (finding that allegations to the effect that a state senator had engaged in corruption and had demonstrated lack of fitness by accepting money from a politically involved entity were legally insufficient because it is not illegal to serve as a paid consultant to politically involved corporations).

³³ *See Meiners*, 687 P.2d at 301, 303.

³⁴ *Citizens*, No. 3AN-05-12133CI at 11.

Council to prepare an election code along with a report for introduction in the 1960 legislative session.³⁵ As requested, Legislative Council prepared a comprehensive election code, and included sections implementing the constitutional provision on recall.³⁶ Those initial legislative actions indicate that the legislature intended the grounds for recall to be considered serious substantive actions of malfeasance and nonfeasance rather than technical or procedural matters. This statutory approach implemented the intent of the Constitutional Convention delegates.

The first draft of the constitutional recall provision that the delegates evaluated read as follows:

Every elected public official in the State, except judicial officers, is subject to recall by the voters of the State or subdivision from which elected. Grounds for recall are malfeasance, misfeasance, nonfeasance, or conviction of a crime involving moral turpitude. The legislature shall prescribe the recall procedures.³⁷

Amendments to this proposal were taken up by the convention beginning on January 4, 1956. Delegate Hellenthal offered the first amendment to the section, seeking to strike the words “involving moral turpitude.”³⁸ He contended that any crime should be sufficient grounds for recall.³⁹ During the debate on this amendment, Delegate McCutcheon contended that the amendment had not gone far enough and that no grounds should be specified for a recall.⁴⁰

As the debate proceeded, however, it was clear that the majority of the delegates did not agree with the views of Delegates Hellenthal and McCutcheon. Delegate Rivers did not want to make lesser crimes grounds for recall.⁴¹ Delegate Johnson thought “there ought to be some protection for public officials.”⁴² Delegate Hellenthal’s amendment to delete the words “involving moral turpitude” failed.⁴³

³⁵ See Legislative Council, *Suggested Alaska Election Code* (Jan. 20, 1960) at 1.

³⁶ See 1st Legis., 2nd Sess., HB 252.

³⁷ Constitutional Convention Committee Proposal No. 3, Report of the Committee on Direct Legislation, Amendment and Revision (December 9, 1955) at 3.

³⁸ 2 Proceedings of the Alaska Constitutional Convention at 1207.

³⁹ *Id.* at 1207–08.

⁴⁰ *Id.*

⁴¹ *Id.* at 1210–1212.

⁴² *Id.* at 1211.

⁴³ *Id.* at 1212.

The next amendment, offered by Delegate Fischer, sought to strike the specified grounds from the recall provision.⁴⁴ The question was then raised whether constitutional silence on the grounds for recall would permit the legislature to prescribe grounds. Delegate Rivers insisted that grounds be prescribed either in the constitution or in statute.⁴⁵ The convention approved the amendment striking the specified grounds from the Constitution's text.⁴⁶

The debate then turned back to the issue of whether the legislature should have the power to specify grounds for recall. Delegate White offered an amendment providing that "[g]rounds for recall shall be set forth in a recall petition."⁴⁷ Delegate White explained that this would remove the legislature's power to prescribe specific grounds for recall.⁴⁸ In response, Delegate Rivers reiterated his view that the legislature should prescribe the grounds for recall.⁴⁹ Delegate Hurley joined Delegate Rivers and expressed his concern that if no grounds for recall were specified,

[I]t does create a nuisance value to which public officials should not be subjected. I recognize that they should be subject to recall, but I think that the grounds should be sincere and they should be. I think it is fair to leave it to the legislature to prescribe the grounds under which a recall petition should be circulated so as to prevent circulation of recall petitions for petty grounds in local jurisdictions by some recalcitrant officer who was not elected, which I have seen happen in my own community.⁵⁰

Delegate White's amendment—to simply have the grounds for recall stated in a recall petition—failed.⁵¹ The convention then took up an amendment from Delegate Rivers that required the legislature to specify grounds for recall. Without further debate, the convention approved the amendment, with a vote of 39 to 11.⁵²

In summary, the convention had serious concerns with the pure "political" recall model that permits the recall of an elected official for any reason or no reason.

⁴⁴ *Id.* at 1213–14.

⁴⁵ *Id.* at 1215.

⁴⁶ *Id.* at 1222.

⁴⁷ *Id.* at 1237.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1238.

⁵⁰ *Id.* at 1238–39.

⁵¹ *Id.* at 1239.

⁵² *Id.* at 1240.

Consequently, the convention soundly rejected this model in favor of requiring the legislature to specify the grounds for recall, creating a threshold that must be met to justify allowing a recall petition to move forward. The delegates supported the idea that grounds for recall should be substantive, not just technical or procedural.⁵³ And the legislature implemented the delegates' intent by enacting substantive grounds for recall.

The specific grounds that the legislature ultimately enacted were selected from a list of grounds set forth in a Library of Congress reference book on state government.⁵⁴ The reference book provided a lengthy list of bases for recall that had been used to that date: "Among the charges noted are unfitness, favoritism, carelessness, extravagance, incompetence, inability, no benefit to public, selfishness, neglect of duties, and corruption."⁵⁵ Notably, the legislative council drafters did not select the entire list. Instead, they picked only four of the grounds mentioned: lack of fitness, incompetence, neglect of duty, and corruption. The drafters' decision to not include lesser or more subjective grounds such as "no benefit to the public," "carelessness," and "selfishness" is consistent with the Constitutional Convention delegates' desire to provide at least "some protection for public officials" from recall on "nuisance" and "petty grounds."⁵⁶

With this background, we consider the three grounds alleged here—neglect of duty, incompetence, and lack of fitness—and provide the standard for evaluating whether the facts, if taken as true, make a *prima facie* showing of the grounds alleged.

1. Neglect of duty means substantial noncompliance with one or more substantive duties of office.

The term "neglect of duty" is not defined in the Alaska recall statutes, and the Alaska Supreme Court has never defined this term in a recall context. Both *Meiners* and *von Stauffenberg* addressed the local government basis for recall—which is "failure to perform duties"—and found that discretionary uses of power are not mandatory duties

⁵³ 2 Proceedings at 1238–39.

⁵⁴ Legislative Council, *Suggested Alaska Election Code* (Jan. 20, 1960) at 67 (citing W. Brooke Graves, *American State Government* 151 (ed. Heath 1953)).

⁵⁵ Graves, *American State Government* 151.

⁵⁶ 2 Proceedings at 1211, 1238–39. *See also Meiners*, 687 P.2d at 295; *von Stauffenberg*, 903 P.2d at 1059 & n. 11 (limiting recall to Alaska to recall for cause, "so as to free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations").

and therefore not grounds for recall.⁵⁷ As stated above, mere policy disagreements are also expressly rejected as grounds for recall.⁵⁸ Although local official recall cases are helpful in understanding the court's approach, the legislature chose "failure to perform duties" as a ground for local recall and "neglect of duty" as a ground for state recall. The legislature's use of different terms suggests that the grounds have different meanings.⁵⁹ "Neglect of duty" requires a higher threshold burden than mere "failure to perform duties"; the former requires a showing of neglect while the latter requires a showing that a duty was affirmatively and intentionally not performed.

Neglect of duty appears to be similar to the concept of "nonfeasance" and encompasses serious and repeated failures to perform substantive essential duties. For example, nonfeasance is defined by Minnesota as "the intentional, repeated failure of a state officer . . . to perform specific acts that are required duties of the officer."⁶⁰ Washington defines the related concept of "violation of the oath of office" as "the willful neglect or failure by an elective public officer to perform faithfully a duty imposed by law."⁶¹ Under Virginia's law, the conduct must have "a material adverse effect upon the conduct of the office" to amount to a neglect of duty.⁶² Virginia's case law suggests that neglect of duty requires an intentional act, and that an honest mistake about which law applies and delay in evaluating the law cannot substantiate a claim for neglect of duty.⁶³

In Alaska, courts apply a substantial compliance analysis to post-election challenges, an approach that provides guidance on how to apply the neglect of duty standard in the recall context. The substantial compliance standard is "necessary to

⁵⁷ *von Stauffenberg*, 903 P.2d at 1060; *see also Meiners*, 687 P.2d at 300 (finding that the board's duty to employ and also control a superintendent was not discretionary but a requisite duty of the board, so that facts alleging a failure to control him were sufficient to demonstrate the board's failure to perform the prescribed duty to employ a superintendent).

⁵⁸ *Meiners*, 687 P.2d at 294; *Citizens*, No. 3AN-05-12133CI at 14; *Cole*, 692 P.2d at 803.

⁵⁹ *See Alaska Spine Ctr., LLC v. Mat-Su Valley Med. Ctr., LLC*, 440 P.3d 176, 182 (Alaska 2019) (assuming if legislature meant the same type of restriction in both subsections then it would have used the same language).

⁶⁰ MN ST § 211C.01(2); *In re Proposed Petition to Recall Hatch*, 628 N.W.2d 125, 128 (Minn. 2001).

⁶¹ *Chandler v. Otto*, 693 P.2d 71, 73–74 (Wash. 1984).

⁶² VA. Code 24.2-233. Virginia has a removal process like recall that similarly begins with a petition, but removal is decided in a court proceeding.

⁶³ *See Warren v. Commonwealth*, 118 S.E.2d 125, 126 (Va. 1923).

distinguish trivial from non-trivial errors and omissions.”⁶⁴ The Alaska Supreme Court holds that “rigidly applying a forfeiture [of election] standard for inconsequential violations is inconsistent with the presumptive validity of election results.”⁶⁵ A consistent theme for election contests is that petitioners have a dual burden, to show malconduct—defined in *Hammond v. Hickel* as a significant deviation from statutory or constitutional norms—that could have affected the election outcome.⁶⁶ First, conduct is not malconduct where the alleged offenders have complied with the purpose of a statute.⁶⁷ Second, the cases also distinguish between duties established in mandatory versus directory statutes. Mandatory statutes go to the essence of why the election law was created.⁶⁸ Directory statutes provide procedural guidance.⁶⁹ For conduct to amount to a violation, it must violate the purpose of a mandatory statute to a degree significant enough to have affected the outcome of an election.⁷⁰

The Alaska Supreme Court’s approach in these election cases is reminiscent of the discussion on recall amongst the Constitutional Convention delegates, which provided the foundation for the statute passed by the Alaska Legislature just a few years later. The delegates were concerned that recall could be used by an opposing political faction to harass an elected official with an application for recall based on technical or procedural grounds—or as one delegate referred to them, “petty grounds.”⁷¹ Neglect of duty was meant to be more than just an unintentional error or failure to comply with a directory, rather than mandatory, duty. Therefore, the duty alleged to have been neglected needs to be substantive, and the facts need to show that the official affirmatively and intentionally failed to substantially comply with that substantive duty in order to meet the recall ground of neglect of duty.

⁶⁴ *Grimm v. Wagoner*, 77 P.3d 423, 429 (Alaska 2003).

⁶⁵ *Id.* at 432. Substantial compliance analysis appears appropriate in a recall context because, just as in the context of an election challenge, a recall is an attempt to undo the result of an election.

⁶⁶ *Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978).

⁶⁷ *Dansereau v. Ulmer*, 903 P.2d 555, 567–68 (Alaska 1995) (“the apparent purpose of AS 15.56.010—to promote an informed electorate and to allow voters to evaluate the solicitations they receive—was substantially met.”); *Hammond*, 588 P.2d at 266, 269 (Alaska 1978).

⁶⁸ *Finkelstein v. Stout*, 774 P.2d 786, 791 (Alaska 1989), overturned on other grounds by *Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018).

⁶⁹ *Id.* at 788.

⁷⁰ *Hammond*, 588 P.2d at 264.

⁷¹ 2 Proceedings at 1238–39.

2. Incompetence means a substantial lack of sufficient knowledge, skills, or professional judgment required to perform substantive duties of the office.

Incompetence has likewise not been defined by the legislature or interpreted by the Alaska Supreme Court. In a superior court case, Judge Savell determined that the definition of incompetence “must relate to a lack of ability to perform the official’s required duties.”⁷² Black’s Law Dictionary provides a broad definition: “the quality, state, or condition of being unable or unqualified to do something.”⁷³

Alaska’s Business and Professions Code offers definitions of professional incompetence that could be helpful in defining incompetence for purposes of recall.⁷⁴ For example, professional incompetence of a medical licensee is defined by regulation as “lacking sufficient knowledge, skills, or professional judgment . . . to a degree likely to endanger the health of his or her patients.”⁷⁵ Likewise, a nurse’s license may be suspended up to two years for conduct found to be “professionally incompetent, if the incompetence results in the public health, safety, or welfare being placed at risk.”⁷⁶ Whereas incompetence of a doctor or a nurse must relate to endangering patients or the health of the public, incompetence of an elected official must relate to performing the substantive duties of the office. Considering the discussion of the constitutional delegates and these other statutory definitions of professional “incompetence,” an elected official will meet the ground for incompetence only if the alleged facts show he lacks sufficient knowledge, skill or professional judgment required to perform substantive duties of the office. It is clear that the term “incompetence” cannot be defined in such a way that it can be used as a proxy for mere policy disagreements—this would permit a result that the Constitutional Convention delegates, the legislature, the Alaska Supreme Court and other state courts have rejected.⁷⁷

⁷² Coghill, 4FA-92-1728CI at 21.

⁷³ Black’s Law Dictionary (11th ed. 2019).

⁷⁴ See, e.g. AS 08.68.850; AS 08.64.302; 12 AAC 36.330 (as interpreted by *Halter v. State, Dep’t of Commerce & Economic Dev., Med. Bd.*, 990 P.2d 1035, 1037 (Alaska 1999) (where the Supreme Court upheld the definition as not unconstitutionally vague as applied in sanctioning a medical professional.)); AS 08.64.326; AS 08.64.130; 12 AAC 44.720; AS 14.20.170. See also *Lee Houston & Assocs., Ltd. v. Racine*, 806 P.2d 848, 853 (Alaska 1991); *Bibo v. Jeffrey’s Restaurant*, 770 P.2d 290 (Alaska 1989); *Van Horn Lodge, Inc. v. White*, 627 P.2d 641, 643 (Alaska 1981).

⁷⁵ 12 AAC 40.970.

⁷⁶ 12 AAC 44.720(b)(3).

⁷⁷ 2 Proceedings at 1207-40; *Meiners*, 687 P.2d at 294; *Citizens*, No. 3AN-05-12133 CI at 14; *Cole*, 692 P.2d at 803.

3. Lack of fitness means substantial physical or mental inability to perform substantive duties of the office.

Prior decisions by the superior court applied vague definitions for lack of fitness that allow sponsors wide latitude in defining it, which is inconsistent with the history of the Constitutional Convention and the recall statutes.⁷⁸ Because these prior decisions are not binding and the definitions are unworkable for purposes of having a substantive threshold, we suggest looking to other statutory definitions when defining “lack of fitness.”

In Alaska’s Business & Professions Code, “fitness” is determined by mental or physical ability.⁷⁹ For example, pilots may be subjected to mental or physical exams to determine their fitness to perform the duties of a pilot,⁸⁰ nurses to determine their fitness to perform the professional duties of a nurse,⁸¹ and pharmacists to determine their fitness.⁸² Social workers must be considered “fit to practice social work as determined by the board” to obtain a certificate of fitness for their licensure.⁸³ Also, pawnbrokers must provide proof they are fit to engage in business as pawnbrokers in order to obtain their requisite licensure.⁸⁴ Physical or mental disability establishes unfitness as a ground for disciplinary action against a medical licensee.⁸⁵ The code also requires a certificate of

⁷⁸ In *Coghill*, Judge Savell used the Black’s Law dictionary definition of “unfitness” available at the time, which reads: “unsuitable; incompetent; not adapted or qualified for a particular use or service; having no fitness.” *Coghill*, No. 4FA-92-1728CI at 23. In *Valley Residents*, Judge Gleason adopted the Division of Election’s definition of lack of fitness: “unsuitability for office demonstrated by specific facts related to the recall target’s conduct in office.” *Valley Residents*, No.3AN-04-6827CI at 10.

⁷⁹ There are also determinations of fitness based on written exams, such as exams required for legal or medical professionals, but these would not apply to determination of the fitness of an elected official.

⁸⁰ AS 08.62.040.

⁸¹ 12 AAC 44.760.

⁸² 12 AAC 52.940.

⁸³ AS 08.95.110(a)(4) (fitness is assessed along with professional standing, but separately from academic degree(s), experience, and moral character, which are addressed in separate subsections).

⁸⁴ AS 08.76.110 (the other qualifications are good character, requisite experience, filing the appropriate application, and paying the required fee).

⁸⁵ AS 08.64.326(8)(C) (“has demonstrated . . . unfitness because of physical or mental disability”).

fitness that certifies only physical fitness for explosives handlers (in construction and excavation)⁸⁶ and for marine pilots.⁸⁷

Considering these statutory approaches to determining fitness as well as the discussion of the constitutional delegates, “lack of fitness” on the part of an elected official should relate to the substantive duties that need to be carried out and a showing of a substantial lack of physical or mental ability to perform those duties. In other words, lack of fitness means a substantial physical or mental inability to perform the substantive duties of the office. Any lesser definition of this phrase would subject elected officials to recall for mere policy choices, a result that was rejected by the constitutional delegates.⁸⁸

V. Analysis

A. The application meets the technical requirements.

The application was accompanied by a \$100 deposit as required by AS 15.45.480. The application sets forth the name and office of the person to be recalled as required by AS 15.45.500(1). The application contains a statement of grounds for recall that, on its face, is not more than 200 words as required by AS 15.45.500(2).

Although the statement of grounds contains a reference section, we do not consider the referenced materials because they would expand the statement to over 149 pages and substantially beyond 200 words. Like Judge Stowers in *Citizens*, we limit our review to the four corners of the application.⁸⁹ This is also the approach the Alaska Supreme Court endorsed in *von Stauffenberg*, where it mentioned external information in its recitation of the case facts and proceedings, but limited its findings to information alleged within the statement of grounds.⁹⁰

The application designated a recall committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the recall as required by AS 15.45.500(4). The application contained signatures of at least 100 qualified voters who subscribe to the application as sponsors for purposes of circulation as required by AS 15.45.500(3).

⁸⁶ AS 08.52.020.

⁸⁷ 12 AAC 56.080.

⁸⁸ *Meiners*, 687 P.2d at 294 (citing to 2 Proceedings at 1237–39); *Citizens*, No. 3AN-05-12133CI at 14; *Cole*, 692 P.2d at 803 (Wash. 1984).

⁸⁹ *Citizens*, No. 3AN-05-12133CI at 17.

⁹⁰ *von Stauffenberg*, at 1056–57.

The application contains the signatures and addresses of qualified voters equal in number to 10 percent of those who voted in the preceding general election for governor as required by AS 15.45.500(3). The valid signature pages contained a statement that the sponsors are qualified voters who signed the application, and the statement of grounds for recall is attached as required by AS 15.45.500(3). The statement of grounds for recall was also printed on the back of all the qualified signature sheets.⁹¹

B. The statement of grounds for recall is factually and legally deficient.

The reviewer must determine whether the statement of grounds for recall is factually sufficient, that is, whether the factual statements are sufficiently particular. Next, the reviewer must determine whether the statement of grounds is legally sufficient, that is, assuming the alleged facts to be true, whether it states a valid legal claim for one of the specified grounds for recall. For the reasons discussed below, we conclude that three of the four allegations listed in the statement fail to sufficiently allege the facts and that all four allegations fail to meet any of the listed grounds for recall—neglect of duty, incompetence, or lack of fitness.

1. The allegation that Governor Dunleavy refused to appoint a judge to the Palmer Superior Court within forty-five days merely alleges a procedural violation and fails to show a violation of any substantive duty.

The first allegation appears to be factually sufficient as there is no dispute that Governor Dunleavy did not appoint a judge to the Palmer Superior Court within forty-five days as provided by Alaska statute. But this does not make a prima facie showing of any of the grounds for recall.

The Alaska Constitution directs the governor to “fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the Judicial Council.”⁹² The constitution does not impose a time deadline on the governor. Instead, it refers only to “filling any vacancy.” The only fact included in the statement of grounds is that the governor refused to appoint within the statutory timeline of forty-five days after receiving the nominations. The statement does not include any facts indicating the governor never appointed a judge, i.e., failed to fill a

⁹¹ There were twenty-three signature pages that failed to include the statement of grounds on the back of the signature page. The Division of Elections did not accept the signatures on these pages for failure to attach the statement of grounds as required by AS 15.45.500(3). The remainder of the qualified signature pages contained enough signatures of qualified voters to surpass the minimum required qualified voter signatures, according to the Division of Elections’ review.

⁹² Alaska Const. art. IV, § 5.

vacancy. And, there is no dispute that the governor did appoint a judge shortly after the forty-five day period and before any vacancy occurred.

The facts also fail to allege that the judicial position was vacant, or that the failure to appoint within the forty-five day window created an unfilled vacancy, strained court resources or created an inability to timely process cases. It was widely reported that the judicial position was not yet vacant at the time of the governor's appointment.⁹³ The governor's substantive duty under the Alaska Constitution is to fill a vacancy, not to make an appointment within a specific timeframe. Absent any other supportive facts, merely missing a statutory timeline that is not included in the substantive constitutional duty to appoint a judge does not amount to substantial noncompliance with the constitutional duty or any other legal ground for recall.

Legislative history and practice also indicate that the statutory timeframe alone does not amount to a substantive duty.⁹⁴ The judicial nomination and appointment statute has been amended twice to permit the Alaska Judicial Council (AJC) more time to nominate candidates. The AJC now has ninety days (as opposed to its original thirty days) after a seat is vacated to send at least two nominees to the governor so that he has a

⁹³ Judge Vanessa White's seat on the Palmer Superior Court was not scheduled to become vacant until late April 2019. In February 2019, the Governor attempted more than once to obtain additional information from the Alaska Judicial Council to ensure the nominating process had properly included the qualified candidates according to the merit-based selection process the constitution requires. The appointments were due on March 21, 2019, but the Governor and Chief Justice were finally able to meet on March 26, 2019 for a productive discussion regarding the judicial selection process. Following that meeting, the Governor interviewed the AJC's two nominees as soon as was practicable and then appointed Kristen Stohler to the Palmer seat on April 17, 2019, before it ever became vacant. The five-day delay, associated with the Governor's meeting with the Chief Justice, resulted in a more fully-informed decision by the Governor, brought about no harm to the public or judiciary, and substantially complied with the prescribed timeframe.

⁹⁴ There are numerous other areas in statute where timelines or actions are considered more of a guideline than a mandate. For example, the legislature is required by AS 24.05.150 to complete its session in ninety days but regularly fails to meet that timeline, instead relying on the constitutional 120-day timeline. Alaska Const. art. II, § 8 (the legislature must adjourn "no later than one hundred twenty consecutive calendar days from the date it convenes"). Legislators cannot be subject to a recall application for the mere failure to adjourn in ninety days, just as the governor cannot be subject to a recall application for the failure to meet the forty-five day timeline for appointment of a judge, especially where no judicial seat was left vacant.

choice of whom to appoint.⁹⁵ This illustrates that the timelines are not set in stone and allowing more time does not amount to a constitutional violation. In fact, during Governor Walker's administration, the AJC intentionally delayed submitting its nominations to the governor rather than submitting them immediately following the AJC's candidate interviews. Because of that delay, all five of Governor Walker's appointments on February 9, 2017 were made more than forty-five days after the AJC interviews were completed.⁹⁶

Because the forty-five day timeframe is merely procedural rather than substantive, the mere failure to comply with it does not amount to neglect of duty. Instead, the Governor fully complied with the substantive constitutional requirement to appoint a judge to fill a vacancy. This allegation, as a matter of law, does not fit the definitions of incompetence or lack of fitness that we explain above.

⁹⁵ AS 22.10.100 (and the ninety-day time period can be extended with the concurrence of the Supreme Court).

⁹⁶ One appointment was made approximately fifty-two days following the AJC interview. Four others were made more than sixty days following their respective AJC interviews. Judge Pat Douglas of Dillingham Superior Court had retired in the fall of 2016, and Judge Reigh was appointed to the Dillingham seat February 9, 2017, approximately sixty-five days after interviews were completed for Dillingham Superior Court. See <http://www.ajc.state.ak.us/selection/histlog.html#a2015>; <https://www.kdlg.org/post/tina-reigh-formally-installed-dillingham-superior-court-judge#stream/0>. Although the AJC delayed in order to accommodate Governor Walker's cancer treatment, the fact that the AJC delayed indicates that the timeframe is not substantively mandatory. If the timeframe were substantive and mandatory then the AJC would not have delayed and would have nominated regardless of Governor Walker's circumstances.

2. The allegation that Governor Dunleavy misused state funds without proper disclosure and for partisan purposes fails to allege sufficient facts to support recall.⁹⁷

The second allegation, stripped of its legal conclusions, reads: “Governor Dunleavy...authoriz[ed] and allow[ed] the use of state funds...to purchase electronic advertisements and direct mailers making...statements about political opponents and supporters.” The facts alleged in this allegation do not meet the factual sufficiency requirement. Instead, the allegation contains the assertion that electronic advertisements and direct mailers were sent using state funds, and that these materials made statements. This does not show a violation of a substantive duty since state funds can be spent on mailers and electronic advertisements.

The allegation does not indicate what the statements said, except that they were about “political opponents and supporters.” Without any further specific facts of what occurred, it is hard to discern exactly what the wrongful conduct was. Does political opponents and supporters mean candidates who had already filed declarations of candidacy? Does that mean the Republican or Democratic Party? And were these made when there was an ongoing campaign? Also, did the governor have a direct hand in purchasing and creating these electronic advertisements? The allegation provides no specific facts to establish that these were unlawful partisan statements made for partisan purposes. Additionally, to say “authorized and allowed” does not show specific personal involvement in, or knowledge of, the creation and approval of content. The allegation states no specific facts regarding how the governor was aware of, or personally authorized, the allegedly partisan statements. This is important because “there is no authority for the proposition that a public official may be recalled for the act of a

⁹⁷ As noted above, the referenced supplemental material is not considered because its inclusion would not substantially comply with the 200-word limit. We cannot look outside the four corners of the statement of grounds. AS 15.45.680; *see also von Stauffenberg*, at 1060; *Meiners*, 687 P.2d at 302–303; *Citizens*, 3AN-05-12133CI at 14; *Steadman*, 641 P.2d at 453. But even if this referenced material was taken into account, the sole electronic advertisement attached to the legal opinion from Legislative Legal Services does not demonstrate a partisan political purpose. The advertisement is not directed at a specific candidate or political group and was not issued during the course of an election. The subject matter of the advertisement is the PFD, which benefits resident Alaskans. The message of the advertisement encourages Alaskans to get involved with the legislative process by communicating with their legislators. This does not amount to a partisan political purpose, but rather normal outreach by the Office of the Governor on matters of public interest, and mere encouragement of citizens to petition their elected representatives. Both permanent fund dividends and citizens engaging to petition their elected representatives benefit the public interest.

subordinate done without the official's knowledge or direction."⁹⁸ As written, the second allegation states legal conclusions without facts to support them. The application does not put the governor or electorate on notice of what specific actions on his part personally amount to neglect of duty, incompetence, or lack of fitness.

The lack of particular facts also leads to legal insufficiency. Without more facts, it is impossible to determine whether the advertisements or mailers were intended for partisan purposes and whether the language was partisan, which is required in order to find a potential violation of the Executive Branch Ethics Act. Partisan political purposes is defined in AS 39.52.120(b)(6):

A public officer may not . . .
use or authorize the use of state funds, facilities, equipment,
services, or another government asset or resource for partisan
political purposes . . . in this paragraph, "for partisan political
purposes"

(A) means having the intent to differentially benefit or harm a
(i) candidate or potential candidate for elective office; or
(ii) political party or group;

(B) but does not include having the intent to benefit the public
interest at large through the normal performance of official duties.

Whether public funds are used for partisan political purposes is a "heavily fact-dependent" legal question, and in this context especially "the principle laid down in *von Stauffenberg*, that there be specific facts alleged, needs to be followed."⁹⁹ It is lawful to use public funds when the use "include[s] having the intent to benefit the public interest at large through the normal performance of official duties."¹⁰⁰ The facts do not specify whether the alleged use of funds included such an intent, and without any indication of the language or targets of the ads and mailers, we cannot objectively infer the intent. This makes it impossible to determine whether the use of public funds was lawful or unlawful.¹⁰¹ Because the included facts do not support the legal conclusions, the allegation is legally insufficient as to neglect of duty, incompetence, and lack of fitness. And the allegations do not as a matter of law fit the definitions of incompetence or lack of fitness.

⁹⁸ *Reed*, 124 P.3d at 281–82 (quoting *Morrisette*, 756 P.2d at 1320).

⁹⁹ *Citizens*, No. 3AN-05-12133CI at 13–14.

¹⁰⁰ AS 39.52.120(b)(6).

¹⁰¹ *Citizens*, No. 3AN-05-12133CI at 13–14.

3. The allegation that Governor Dunleavy violated separation of powers is based on the Governor's lawful exercise of his constitutionally granted discretionary line-item veto authority and cannot be grounds for recall.

Alaska Constitution article 2, section 15 expressly authorizes the governor to line-item veto sums of money in any appropriation bill at his discretion, including appropriations to the judiciary. The constitution does not except the judiciary from the governor's line-item veto power. The legislature then has the opportunity to override each veto with a three-quarters vote under article 2, section 16. In the third allegation, the sponsors allege that Governor Dunleavy used the line-item veto to "attack the judiciary and the rule of law" and "preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities." These are conclusory statements with no detail on what and how much the Governor vetoed or how the vetoes precluded the legislature from upholding its duties. The allegation regarding Health, Education, and Welfare responsibilities is particularly vague, and it would be difficult for the targeted official to respond in 200 words, let alone for the public to understand what actions of the Governor are at issue aside from his constitutionally granted discretionary authority to strike or reduce appropriations generally or general policy disagreements over his vetoes. For these reasons, the third allegation is factually insufficient. But even if it is found to be factually sufficient, the governor's use of the constitutionally granted line-item veto authority is absolutely legal, purely discretionary, and disputes over policy cannot be grounds for recall.¹⁰²

The budgeting process is a "joint responsibility" of the legislature and the governor "to determine the State's spending priorities on an annual basis."¹⁰³ Here, staying within the confines of the statement of grounds for recall, the Governor exercised his constitutionally granted line-item veto authority to reduce certain appropriations to the judiciary along with many other parts of government, in particular relating to health,

¹⁰² *von Stauffenberg*, 903 P.2d at 1060. General policy disagreements with the governor, whether regarding budget vetoes or other matters, is not, as a matter of law, a valid basis for recall. *See* 2 Proceedings at 1207-40; *Meiners*, 687 P.2d at 294; *Citizens*, No. 3AN-05-12133CI at 14; *Cole*, 692 P.2d at 803.

¹⁰³ *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006).

education, and welfare.¹⁰⁴ The next step under the Alaska Constitution is for the legislature to have an opportunity to override the veto. The allegations do not indicate that the Governor tried to bypass the legislative power or institute his line-item vetoes after they had been overridden—likely because the legislative history available on the legislature’s website shows as a matter of public record that the legislature never exercised its authority to override any of the vetoes.

This is exactly how the budgeting process is meant to work, and the Governor exercising his constitutionally granted discretionary line-item veto authority does not amount to substantial noncompliance with a substantive duty or any showing that he acted incompetently or was unfit when he made these discretionary decisions. Both the legislature and the Governor carried out their constitutional duties as set forth in the constitution. If the Governor’s actions in exercising his constitutionally granted line-item veto power constituted a ground for recall, then the legislature’s failure to override must also constitute a ground for recall. But this would be an absurd result and does not comport with the intent of the recall statutes.

4. The allegation that Governor Dunleavy mistakenly vetoed more money than he told the legislature he intended to reduce merely asserts a scrivener’s error that does not rise to the level of incompetence, lack of fitness, or neglect of duty.

The only facts in the fourth allegation state the governor “mistakenly vetoed \$18 million more than he told the legislature in official communications he intended to strike.” The fourth allegation goes on to reach a legal conclusion that “the error would cause the state to lose over \$40 million in federal Medicaid funds.” This allegation is actually attempting to interpret the appropriations bill, which is uncodified law.¹⁰⁵ Uncodified law is no different than codified law, except for its temporary nature. Any legal conclusion about the result of the error or how the law would be interpreted is to be reviewed *de novo* by the reviewer of the recall application.

¹⁰⁴ One could assume that the allegation about attacking the judiciary refers to the widely reported veto message on the reduction to the Alaska Court System of \$334,700, the stated purpose of which was to reduce the appropriation by the amount of the cost of state-funded elective abortions. Although this factual detail is not within the confines of the statement of grounds for recall and should not be considered, the analysis would not change, even if it were taken into account. Significantly, the \$334,700 veto amounted to less than 1% of the appropriation to the Alaska Court System. The Governor’s veto came nowhere near defunding the judicial branch or hindering it from carrying out its constitutional duties, which arguably could be considered an abuse of discretion that would amount to a neglect of duty.

¹⁰⁵ HB 39 (Ch. 1 FSSLA 2019).

House Bill 39, after the governor's line-item vetoes, shows that the governor intended to veto, and struck in the allocation section, \$27,004,500 to eliminate the Adult Preventive Dental program.¹⁰⁶ This amount, which represents approximately \$18 (closer to \$19) million in federal funds and \$9 (closer to \$8) million in state funds, was incorrectly transcribed in the appropriation line for the Medicaid Services budget, resulting in the entire \$27 million being shown as a reduction from state funds and not a combination of state and federal.¹⁰⁷ This is clearly a scrivener's error and is evident as such on the face of the enacted line-item vetoes.

One scrivener's error does not amount to a showing of lack of knowledge, skills, or professional judgment required to perform the discretionary duty of line-item vetoes on an appropriations bill.¹⁰⁸ If this amounts to incompetence, then every governor and legislator could be recalled for any technical error made on an official document or letter. For incompetence to be met, the facts must show that skill or judgment is lacking to such a degree that it is interfering with the ability of the governor to perform his substantive duties. The governor performed his duty to strike or reduce items, and no facts alleged show that he lacks the skill or judgment to carry out this duty.¹⁰⁹

Additionally, as a matter of law the legal result of this error would not have been to lose over \$40 million in federal Medicaid funds. Following the enactment of the line-item vetoes, the Department of Law was asked to interpret the enacted law. The department advised the Office of Management and Budget that HB 39 should be interpreted to accomplish its intent, which was to eliminate funding for the program. In order to implement that intent, the reduction in the state general fund appropriation would not be \$27 million but instead would be \$8,273,600 with the remainder reduced from federal funding because the program is funded by a mix of state and federal funds. This conclusion was based on the clear intent of the legislation as disclosed on the face of the

¹⁰⁶ Ch. 1 FSSLA 2019, page 21, lines 16–17.

¹⁰⁷ *Id.* at page 20, line 27.

¹⁰⁸ “An allegation akin to mere ‘administrative incompetence’ does not support recall.” (1992 Op. Att’y Gen. (Aug. 24; 16918-0004).)

¹⁰⁹ As a matter of normal routine and practice, the governor does not personally draw lines over appropriation items. Documents are prepared for him by staff at his direction on what he wants to veto. He then initials the items. The allegations state no facts to claim that the Governor personally committed the scrivener error. To take this type of typographical error that clearly involves multiple staff in the creation of the document and find that it amounts to a showing of incompetence, lack of fitness, or neglect of duty on the part of the Governor personally would turn the whole point of requiring grounds for recall on its head. And once again, an elected official cannot be recalled based upon the acts of another of which they are unaware and did not approve. *Reed*, 124 P. 3d at 281–82 (quoting *Morrisette*, 756 P.2d at 1320).

bill, which was to veto funding for the program, and as disclosed in the veto message, which provided that the veto would result in a reduction in spending of state and federal funds (not just state funds) of \$18,730,900 in federal receipts and \$8,273,600 in general funds.¹¹⁰

Moreover, the reasons for rejecting the third allegation also apply here. A governor's use of the constitutionally granted line-item veto power is discretionary and cannot constitute a basis for recall for neglect of duty.¹¹¹ Even if the enacted appropriation was interpreted to be a reduction of \$18 million in state general funds, there is no showing that the governor failed to substantially comply with his constitutional duty in exercising his line-item veto authority. The governor could have intentionally chosen to reduce the Medicaid Services budget by an additional \$18 million in state funds, and that action would have been completely within the governor's constitutional discretion. Disagreement with the governor's intentional veto of this \$18 million could not, as a matter of law, be a valid ground for recall.¹¹²

For these reasons, the fourth allegation fails both factually and legally to make a prima facie showing of neglect of duty, lack of fitness, or incompetence.

VI. Conclusion

My recommendation is that you decline to certify the application for recall of Governor Dunleavy because the statement of grounds is neither factually nor legally sufficient and therefore not substantially in the form required by AS 15.45.550(1). If you decline to certify this application, you should advise the recall committee that it has the right to seek judicial review under AS 15.45.720 within thirty days of the date of the notice of your determination.

Sincerely



Kevin G. Clarkson
Attorney General

¹¹⁰ The Department of Law's legal interpretation of HB 39 was included in the veto message attached to HB 2001 (Ch. 2 FSSLA 2019), which can be found on the Office of Management and Budget's website at https://omb.alaska.gov/ombfiles/20_budget/PDFs/FY20_HB2001_Post_Veto_CR_Detail_8-19-19.pdf, page 27.

¹¹¹ *von Stauffenberg*, 903 P.2d at 1060.

¹¹² *See* 2 Proceedings at 1207-40; *Meiners*, 687 P.2d at 294; *Citizens*, No. 3-AN-05-12133 CI at 14; *Cole*, 692 P.2d at 803.

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☎ 907-465-4611 📠 907-465-3203
elections@alaska.gov



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Anchorage 907-522-8683
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Juneau 907-465-3021
Nome 907-443-5285
Mat-Su 907-373-8952

STATE OF ALASKA
Division of Elections
Office of the Lieutenant Governor

November 4, 2019

Mr. Joe Usibelli Sr.
100 Cushman Street #210
Fairbanks, Alaska 99701

Sent via email to: peggyzoe@gmail.com
iusibelli@sprynet.com

Dear Mr. Usibelli:

In accordance with AS 15.45.540, I have reviewed your application for the recall of Governor Michael J. Dunleavy and I am denying certification of the application. My decision is based on the legal advice received from the Attorney General that the grounds for recall do not satisfy the legal standard for the three statutory grounds for recall alleged in the application—neglect of duty, incompetence, and lack of fitness—under AS 15.45.510. Therefore, the application is not substantially in the form as required by AS 15.45.550(1).

Alaska law addresses the bases of denial of certification:

Sec. 15.45.550. Bases of denial of certification.

The director shall deny certification upon determining that:

- (1) the application is not substantially in the required form;
- (2) the application was filed during the first 120 days of the term of office of the official subject to recall or within less than 180 days of the termination of the term of office of any official subject to recall;
- (3) the person named in the application is not subject to recall; or
- (4) there is an insufficient number of qualified subscribers.

The Attorney General determined the technical requirements of the recall statutes were met, however the statement of grounds for recall are not factually and legally sufficient for purposes of certification. The legal opinion determined that as Governor of the State of Alaska, Michael J. Dunleavy is subject to recall under the Constitution and statutes; the grounds for recall did not exceed 200 words (excluding the referenced material); there was a designation of a recall committee consisting of three qualified voters who subscribed to the application; and there were at least 100 qualified voters who signed as sponsors.

Mr. Joe Usibelli, Sr.
November 4, 2019
Page 2 of 2

The Division of Elections' review of the signature booklets determined there were a sufficient number of qualified voters who subscribed to the application for recall with the statement of grounds attached and the name and office of the person subject to recall on the signature page. Attached to this letter is the "Petition Summary Report," which shows the qualification of signatures of registered voters submitted with this application. The application must have contained signatures of qualified voters equal in number to ten percent of those who voted in the preceding general election. There were 285,009 votes cast in the 2019 general election. The minimum number of qualified voter signatures required was 28,501. The Division qualified the signatures of 46,405 voters.

Also attached for your information is the Department of Law Attorney General Opinion, which provides the legal review I sought during my review of the application, and upon which I relied in deciding to deny certification. Under Alaska law, any person aggrieved by this decision may obtain judicial review. AS 15.45.720 authorizes judicial review and provides:

Any person aggrieved by a determination made by the director under AS 15.45.470 - 15.45.710 may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of determination was given.

If you have any questions, or if there is further information that I can provide, please feel free to contact me.

Sincerely,



Gail Fenumiai
Director

Enclosures

Petition Summary Report
Attorney General Opinion, dated November 4, 2019

cc: Arliss Sturgulewski, Recall Committee Member, arliss.sturgulewski@ascenipgm.com
Victor Fischer, Recall Committee Member, victorfischer24@gmail.com
The Honorable Kevin Meyer, Lieutenant Governor
The Honorable Michael J. Dunleavy, Governor
Scott Kendall, Recall Committee Counsel, SMKendall@hwb-law.com

Office of Governor
MICHAEL J. DUNLEAVY

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Governor Announces Four New Judges, Declines to Fill Vacant Seat Without Additional Information from Judicial Council

March 21, 2019

March 21, 2019 (Juneau, Alaska) – Alaska Governor Michael J. Dunleavy today announced his selections to fill Alaska Superior and District Court judgeships in Utqiagvik, Kodiak, Anchorage, and Palmer.

"Congratulations to these dedicated individuals. Their qualifications and record of public service are a positive testament to their ability to serve the people of Alaska as members of our judiciary. We wish them all the best as they serve our state and their communities in this new capacity," said **Governor Dunleavy**.

Governor Dunleavy's judicial appointments are:

John C. Cagle has been appointed to the Palmer Superior Court. Mr. Cagle has been an Alaska resident for 8 ½ years and has practiced law for 14 years. He graduated from Gonzaga University School of Law in 2003 and is currently an assistant district attorney in Anchorage.

Nelson Traverso has been appointed to the Utqiagvik Superior Court. Mr. Traverso has been an Alaska resident for 36 years and has practiced law for 35 years. He graduated from Northeastern University School of Law in 1981 and is currently in private practice in Fairbanks.

Stephen B. Wallace has been appointed to Kodiak Superior Court. Mr. Wallace has been an Alaska resident for 36 years and has practiced law for 29 ½ years. He graduated from the University of Oregon School of Law in 1988 and is currently the district attorney in Bethel.

David Nesbett has been appointed to the Anchorage District Court. Mr. Nesbett has been an Alaska resident for 47 years and has practiced law for 20 years. He graduated from the University of the Pacific, McGeorge School of Law, in 1998, and is currently in private practice in Anchorage.

Governor Dunleavy has also declined to select a second candidate to serve on the Palmer Superior Court, citing his concern for a truncated list of candidates and questions whether the judicial selection process was consistent with the merit and qualifications based standard of the Alaska judicial system.

"For the two positions on the court, the Council received 11 applications. From this field of candidates, you only nominated three candidates for two positions," **Governor Dunleavy wrote in a letter to the Alaska Judicial Council.** "I believe there are qualified candidates that the Council inexplicably did not nominate for this position."

"Alaska's constitutional judicial selection process is supposed to be merit and qualifications based. The list you provided me does not appear to uphold this important standard," **wrote Governor Dunleavy.**

"My authority to appoint members to the bench carries with it the obligation to exercise that authority thoughtfully and responsibly. My office has requested more information from the Council on candidates that were not recommended, including the Council's reasoning for excluding some candidates," **Governor Dunleavy wrote.** "I would like an opportunity to review and consider the Council's reasoning to determine whether additional qualified candidates could be nominated by the Council for this position."

Governor Dunleavy's full letter to the Alaska Judicial Council can be found [here](#).

###

STATE CAPITOL
P.O. Box 110001
Juneau, AK 99811-0001
907-465-3500



550 West Seventh Avenue, Suite 1700
Anchorage, AK 99501
907-269-7450

Governor Michael J. Dunleavy
STATE OF ALASKA

March 20, 2019

Alaska Judicial Council
510 L Street, Suite 450
Anchorage, AK 99501-1295

Dear Judicial Council Members:

I have selected a candidate to fill one of the positions on the Palmer Superior Court from the three candidates the Council forwarded. I will not be selecting a second candidate from this truncated list.

For the two positions on the court, the Council received 11 applications. From this field of candidates, you only nominated three candidates for two positions. After reviewing the list of nominated and non-nominated candidates, I believe there are qualified candidates that the Council inexplicably did not nominate for this position. In addition, you declined to nominate, for the Palmer Superior Court, a candidate that you previously nominated for the Anchorage Superior Court and have currently nominated for the Anchorage District Court. Alaska's constitutional judicial selection process is supposed to be merit and qualifications based. The list you provided me does not appear to uphold this important standard.

My authority under Article IV, Sections 4 and 5, of the Alaska Constitution to appoint members to the bench carries with it the obligation to exercise that authority thoughtfully and responsibly. This is an obligation that we both share. My office has requested more information from the Council on candidates that were not recommended, including the Council's reasoning for excluding some candidates. Thus far you have declined to provide me more information. I would like an opportunity to review and consider the Council's reasoning to determine whether additional qualified candidates could be nominated by the Council for this position.

I look forward to working with the Council to fulfill our joint constitutional obligations.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. Dunleavy".

Michael J. Dunleavy
Governor

Office of Governor
MICHAEL J. DUNLEAVY

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Governor Comments on Judicial Nomination Process Following “Fruitful and Productive” Meeting with Chief Justice Bolger

March 27, 2019

Wednesday, March 27, 2019 (Nome, AK) – Alaska Governor Michael J. Dunleavy today issued a statement following a meeting yesterday with Alaska Supreme Court Chief Justice Joel Bolger:

“Yesterday, I met with Chief Justice Bolger to discuss a variety of issues surrounding the process to fill a vacancy on the Palmer Superior Court,” said **Governor Dunleavy**. “This meeting was both productive and fruitful, and provided important clarification about process I was seeking when deciding to delay this nomination. As a result, I intend to interview the two Palmer Superior Court nominees and will soon fill this vacancy from the council’s nominees.

“In declining to name a second nominee to the Palmer Superior Court, I announced my intention to better understand the judicial nomination process and to further clarify whether or not the Council was in fact upholding the merit and qualifications-based standard. My hope was to further review and consider the information before us and ensure this process was thoroughly understood by my office,” **Dunleavy said**. “Based on my discussions with Chief Justice Bolger, my concerns have been satisfied. I expect to make an announcement on this matter in the near future.”

On March 21st, 2019, Governor Dunleavy announced his selections to fill Alaska Superior and District Court judgeships in Utqiagvik, Kodiak, Anchorage, and Palmer, but declined to fill a second vacancy to the Palmer Superior Court without additional information.

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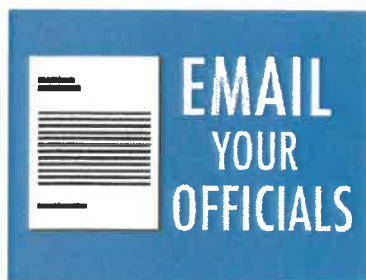
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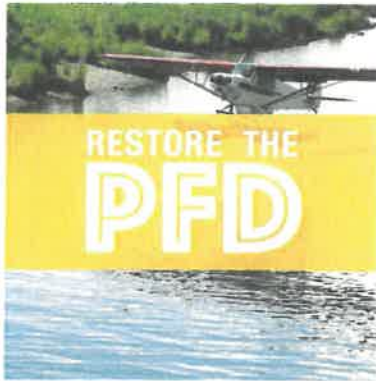
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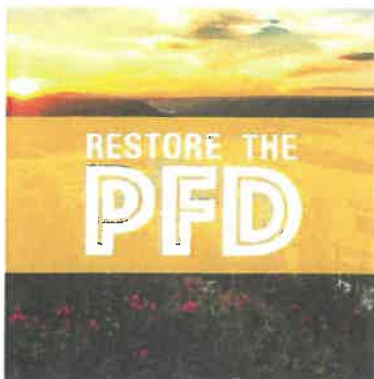
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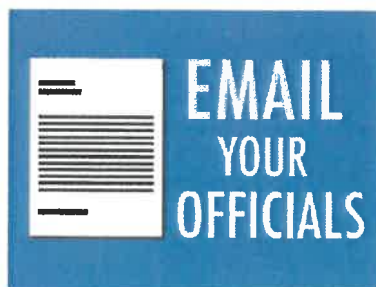
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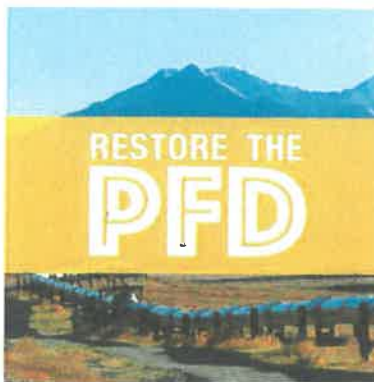
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Posts

 Restore the PFD shared a post
July 30 ·

Take this poll.

 Suzanne Downing created a poll.
July 30 ·

Quick poll: Read carefully.

Should Gov. Dunleavy:

1. ACCEPT the Legislature's \$1600 PFD and fight for the other \$1400 ...

[See More](#)



ACCEPT \$1,600 PFD

VETO - ALL OR NOTHING

This poll has ended.

2.5K Votes

39

25 Comments 27 Shares

 Restore the PFD shared a video
June 28

See more of Restore the PFD on Facebook

Log In

or

Create New Account

21,384 Views

Governor Mike Dunleavy
June 26 at 1:23 PM · 🌐

Today I signed the State of Alaska operating budget for fiscal year 2020 - which included a series of line-item vetoes to better align our state expenditures and revenues. I truly believe that Alaska's best days are ahead of us, and with this budget we are on the right path.

199

38 Comments 40 Shares

[See All](#)

Posts



Restore the PFD

June 24 ·

Lawmakers need to know you support a full PFD this year. Use this tool to contact your elected official now: <https://akgov.us/cyl>



CONTACT YOUR OFFICIALS

FS9.FORMSITE.COM

Contact Your Elected Officials

Support a full PFD by sending a letter to your elected officials.

1.2K

708 Comments 400 Shares

Most Relevant



Byron Holmes Pay the Bills of the State, Fully FUND Education and Public Safety!! THEN offer dividends.

17w



Deb Fooying I rather see the funds use to fix our roads and bridges!! Our infrastructure needs help.

17w

2 of 376



Restore the PFD shared a post.

June 19

See more of Restore the PFD on Facebook

Log In

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8,940 Views

Governor Mike Dunleavy

June 15 ·

Today I spoke with members of the Legislature's Bicameral Permanent Fund Working Group about the importance of the PFD to Alaskans all across the state. As I have said again and again, there should be no change to the decades old PFD formula without a vote of the people.

145

6 Comments · 26 Shares

Most Relevant



Rodney Kay That was one of the main reasons we sent you to Juneau. Keep up the fight!

18w



Theresa Harris Ritter Keep Strong for Alaskan's Rights! Walker was such a joke! He stole from us!

18w



Restore the PFD shared a post.

June 12



Governor Mike Dunleavy

June 12 ·

When given the chance to provide Alaskans with a full statutory PFD (approximately \$3,000 this year), the Alaska House said no by a vote of 21-15. While this wa...

[See More](#)

182

38 Comments · 48 Shares

Most Relevant

Rose Smith Thank you, Governor. We appreciate your tenacity. Please call for the special session to be in Wasilla. I will make it a point to visit each of them daily until they hear the message loud and clear. I'm sure we can recruit a local and an out of town crowd to share their thoughts with them as well. They MUST learn to do the will of the people and not the will of special interests.

19w



Russell Cunningham move them out of Juneau to a place where we can have access to our lawmakers. save tons of cash of travel and per diem and as a bonus they get to hear our words directly from us

19w

[See More](#)

See more of Restore the PFD on Facebook

Log In

or

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We won't support this browser soon. For a better experience, we recommend using another browser. [Learn More](#)

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Email or Phone

Password

[Log In](#)[Forgot account?](#)**Restore the PFD**

May 23 ·

A few short years ago, Representative [Tammie Wilson](#) was a champion of the PFD. Now she wants to cut the PFD for future generations to pay for government. Contact her office at (907) 465-4797 and tell her there should be no change to the PFD without a vote of the people.



1.1K

484 Comments 484 Shares

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Repeal SB91
@MakeAlaskaSafe

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CONTACT INFO

m.me/MakeAlaskaSafe

MORE INFO

About

Alaskans for the Repeal of SB 91!

Company Overview

The sole purpose of the State of Alaska's (State's) use of social media is to provide information to the public and to engage the public in a civil dialogue regarding only that information. The State may remove any comment that wholly or partially does not relate to its post; contains obscene, indecent, or profane language; may compromise safety or public welfare; may violate a State or federal law; or contains a link or attachment that may compromise a system or equipment. This platform and any messaging system on this platform will not be recognized by the State of Alaska as a means for submitting any request, notice, or comment that the State is legally obligated to consider or respond to; visit the agency's website for contact information. The following link contains other critical information concerning your use of this page, including your potential liabilities:

<http://doa.alaska.gov/resources/socialMediaPolicy.html>.
Edi

[Community](#)

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Repeal SB91



Repeal SB91
@MakeAlaskaSafe
Community 1,571 likes

Page transparency

Page created Mar 14, 2019

Page name has not changed

Primary country location for people who manage this Page includes: United States (2)

Total spent by Page on ads about social issues, elections or politics ...

May 2018 - Oct 21, 2019
United States

\$8,173

[See spend details](#)

Recently spent by Page on ads about social issues, elections or politics ...

7 days • Oct 15 - Oct 21, 2019
United States

\$0

12 results

Showing ads from Repeal SB91.

View: All Ads Issue, Electoral or Political

Filter By: United States Active and Inactive All Impressions All Platforms

Repeal SB91

Launched July 2019

☒ Inactive
Jul 10, 2019 - Jul 16, 2019
ID: 377955726413065

About social issues, elections or politics



Repeal SB91
Sponsored • Paid for by Governor Mike Dunleav

Alaska is a much safer place now that Governor Mike Dunleavy has signed House Bill 49 and repealed the failed SB91.

Learn more at: <http://akgov.us/127fd>

SB91 Repealed

[See Ad Details](#)

Launched May 2019

● Inactive

May 12, 2019 - May 12, 2019
ID: 382267149056410

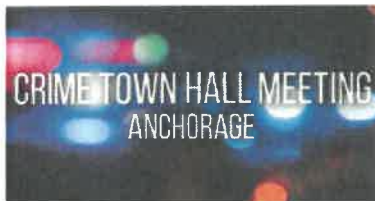
About social issues, elections or politics



Repeal SB91

Sponsored • Paid for by Governor Mike Dunleav

Join Lieutenant Governor Kevin Meyer and State of Alaska public safety professionals in Anchorage to share your story of how crime has affected your life and community.



MON, MAY 13, 2019

Anchorage Crime Town Hall Meeting
Wilda Marston Theater, Z.J. Loussec Public Library, Anchorage
Anchorage Crime Town Hall Meeting

[View...](#)[See Ad Details](#)

Launched April 2019

● Inactive

Apr 3, 2019 - May 2, 2019
ID: 2265836713734722

About social issues, elections or politics



Repeal SB91

Sponsored • Paid for by Governor Mike Dunleav

For a safer Alaska, the legislature must Repeal and Replace SB 91. Join our team of Alaskans working to make Alaska safer.

● Inactive

Apr 3, 2019 - May 2, 2019
ID: 445065446284988

About social issues, elections or politics



Repeal SB91

Sponsored • Paid for by Governor Mike Dunleav

For a safer Alaska, the legislature must Repeal and Replace SB 91. Join our team of Alaskans working to make Alaska safer.

● Inactive

Apr 23, 2019 - Apr 27, 2019
ID: 345185278356375

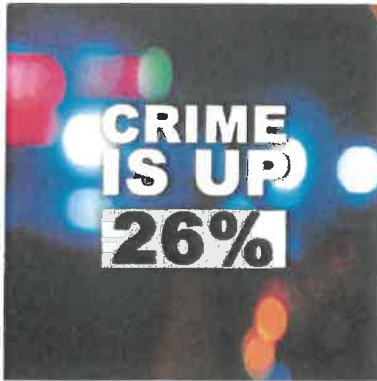
About social issues, elections or politics



Repeal SB91

Sponsored • Paid for by Governor Mike Dunleav

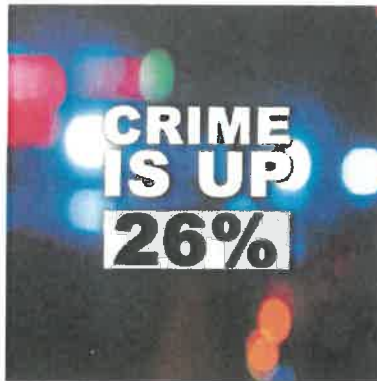
The Legislature needs to act on Governor Mike Dunleavy's crime legislation, so Alaskans can feel safe in every corner of our state.



Repeal SB91
Community
1,571 people like this

Like Page

[See Ad Details](#)



Repeal SB91
Community
1,571 people like this

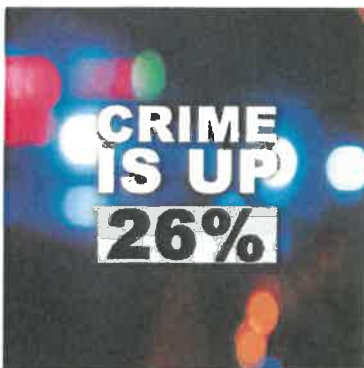
Like Page

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Alaskans Want our Crime Bills

[See Ad Details](#)



SIGN THE PETITION >>>

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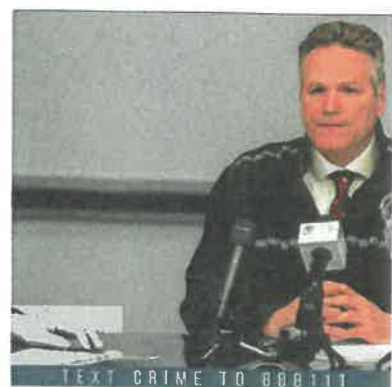
[See Ad Details](#)



SIGN THE PETITION >>>

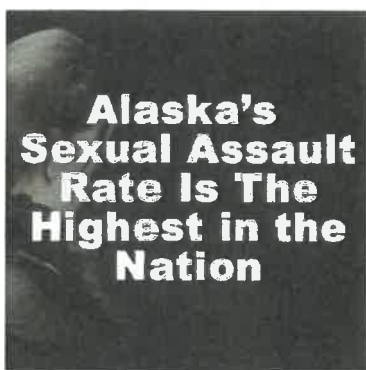
Sign Up

[See Ad Details](#)



No More Games. Pass the Crime Bills.

[See Ad Details](#)



SIGN THE PETITION >>>

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Cap Government
Spending
@CapSpending

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Reviews

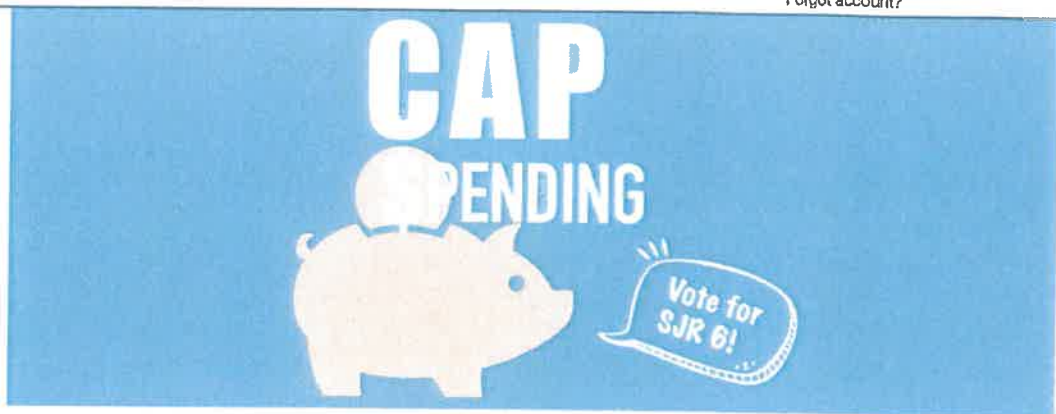
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CONTACT INFO

m.me/CapSpending

<http://www.gov.alaska.gov>

MORE INFO

About

Cap Government Spending supports Governor Dunleavy's bill to create a straightforward, understandable, and effective limit on government growth.

[Community](#)

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Cap Government Spending



Cap Government Spending

@CapSpending

Community 158 likes

Page transparency

Page created Mar 28, 2019

Page name has not changed

Primary country location for people who manage this Page includes: United States (1)

Total spent by Page on ads about social issues, elections or politics

May 2018 - Nov 9, 2019
United States

\$3,312

[See spend details](#)

Recently spent by Page on ads about social issues, elections or politics

7 days • Nov 3 - Nov 9, 2019
United States

\$0

34 results

Showing ads from Cap Government Spending.

View: [All Ads](#) [Issue, Electoral or Political](#)

Launched June 2019

Inactive

Started running on Jun 26, 2019
ID: 398175211044547

About social issues, elections or politics



Cap Government Spending

Sponsored • Paid for by Office of the Governor of Alaska

Thank Rep. Merrick for voting to cut the budget and keep government spending in check. She's a fighter for a permanent fiscal plan. Email rep.kelly.merrick@akleg.gov or call her office at (907) 694-8944 and say 'thank you'!



[See Ad Details](#)

Inactive

Started running on Jun 26, 2019
ID: 321438618761950

About social issues, elections or politics



Cap Government Spending

Sponsored • Paid for by Office of the Governor of Alaska

Thank Rep. Rasmussen for voting to cut the budget and keep government spending in check. She's a fighter for a permanent fiscal plan. Email rep.sara.rasmussen@akleg.gov or call her office at (907) 465-3892 and say 'thank you'!



[See Ad Details](#)

Inactive

Started running on Jun 25, 2019
ID: 1490390457767332

About social issues, elections or politics



Cap Government Spending

Sponsored • Paid for by Office of the Governor of Alaska

Thank Rep. Revak for voting to cut the budget and keep government spending in check. He's a fighter for a permanent fiscal plan. Email rep.josh.revak@akleg.gov or call his office at (907) 465-3679 and say 'thank you'!



[See Ad Details](#)

Launched April 2019

Inactive

Apr 25, 2019 - May 1, 2019
ID: 420829321827752

About social issues, elections or politics

This ad has multiple versions.



Cap Government Spending

Sponsored • Paid for by Office of the Governor of Alaska

Use this handy tool to send a letter to your local officials telling them you support a cap on government spending.

Inactive

Apr 12, 2019 - Apr 20, 2019
ID: 295849307975680

About social issues, elections or politics



Cap Government Spending

Sponsored • Paid for by Office of the Governor of Alaska

Use this easy tool to write your local officials about supporting a cap on government spending.

Inactive

Apr 12, 2019 - Apr 20, 2019
ID: 411638939661284

About social issues, elections or politics



Cap Government Spending

Sponsored • Paid for by Office of the Governor of Alaska

If you believe we need to cap government spending, now is the time to tell your local officials. Use this quick and easy tool.

Ad Library

Log In

The image displays a 4x3 grid of 12 ad preview cards. The first two rows show 'Contact Your Officials' ads, and the last two rows show 'CAP Spending' ads. Each card includes a thumbnail, a title, a description, a URL, and a 'Contact Us' or 'Sign Up' button. The grid is filtered by 'United States' and 'Active and Inactive'.

Thumbnail	Title	Description	URL	Button
	Contact Your Officials	Use this tool to email your officials.	CONTACT.YOUR.OFFICIALS	Contact Us
	Contact Your Officials	Use this easy tool to email your officials.	WWW.AKGOV.US/CYO	Contact Us
	Contact Your Officials	Use this easy tool to email your officials.	WWW.AKGOV.US/CYO	Contact Us
	Contact Your Officials	Use this easy tool to email your officials.	WWW.AKGOV.US/CYO	Contact Us
	Sign the Petition	Sign the Petition	WWW.AKGOV.US/CYO	Sign Up
	Sign the Petition	Sign the Petition	WWW.AKGOV.US/CYO	Sign Up
	Sign the Petition	Sign the Petition	WWW.AKGOV.US/CYO	Sign Up
	Sign the Petition	Sign the Petition	WWW.AKGOV.US/CYO	Sign Up
	Sign the Petition	Sign the Petition	WWW.AKGOV.US/CYO	Sign Up
	Sign the Petition	Sign the Petition	WWW.AKGOV.US/CYO	Sign Up
	Sign the Petition	Sign the Petition	WWW.AKGOV.US/CYO	Sign Up
	Sign the Petition	Sign the Petition	WWW.AKGOV.US/CYO	Sign Up

LETTER OF INTENT

COMPLETED

Submission Date: **06/24/2019**

Filer First Name: **Sara**

Filer Middle Name:

Filer Last Name: **Rasmussen**

Election: **2020 - State Primary Election**

Office Type: Did Not Report

CANDIDATE INFORMATION

Election Year: **2020**

Candidate Display Name: **Sara Rasmussen**

Candidate Legal First Name: **Sara**

Candidate Legal Last Name: **Rasmussen**

Campaign Mailing Address: **5751 Katahdin Dr**

City, State Zip: **Anchorage , Alaska 99502**

Phone: **9072233522**

Email: **Sararasmussenak@gmail.com**

Fax (Optional): Did Not Report

LETTER OF INTENT

AMENDED

COMPLETED

Submission Date: **06/13/2019**Filer First Name: **Joshua**Filer Middle Name: **C**Filer Last Name: **Revak**Election: **2020 - State Primary Election**Office Type: **House**

CANDIDATE INFORMATION

Election Year: **2020**

Candidate Display Name:

Candidate Legal First Name:

Candidate Legal Last Name:

Campaign Mailing Address:

City, State Zip: , **Alaska**

Phone:

Email:

Fax (Optional): Did Not Report

From: Shuckerow, Matt N (GOV) <matt.shuckerow@alaska.gov>
Sent: Wednesday, July 17, 2019 6:52 PM
To: Jeff Landfield <jeff@alaskalandmine.com>
Cc: GOV Press Office Team <GOV.PressOffice@alaska.gov>
Subject: RE: Revak and Costello Mailers

Jeff,

The Office of the Governor has explored a variety of different options to best communicate with Alaskans, including the use of digital and printed communication, traditional media, radio, social media, and more. In an ever changing media and information landscape, examining how best to inform Alaskans continues to be a goal of the Office of the Governor.

These forms of communication all represent an effort to inform Alaskans on the issues of the day and how best to remain engaged on items of critical importance, including issues such as crime and public safety, the budget, the Permanent Fund Dividend, and a permanent fiscal plan for Alaska.

The printed communications represent only one small part of the Governor's Office outreach to Alaskans. This form of communication was used in a limited capacity to measure whether or not it was an effective way to communicate with Alaskans.

In total, approximately \$3500 was allocated for printed communications.

Approximately \$31,500 has been spent on paid communication through Facebook.

The Office of the Governor places a great deal of priority on scarce financial resources, particular in the face of budget deficits, but believes dollars allocated to inform Alaskans are well-spent and are in-line with other efforts and actions taken by Governor's offices.

Thanks,
Matt

From: Jeff Landfield <jeff@alaskalandmine.com>
Sent: Monday, July 15, 2019 10:52 AM
To: Shuckerow, Matt N (GOV) <matt.shuckerow@alaska.gov>
Subject: Re: Revak and Costello Mailers

Following up on this. Let me know.

Thanks,

Jeff

Get [Outlook for iOS](#)

From: Jeff Landfield
Sent: Thursday, July 11, 2019 4:03:11 PM
To: Shuckerow, Matt N (GOV)
Subject: Revak and Costello Mailers

Matt,

Is the Governor's Office sending out the mailers for Revak and Costello, or financing them in any way?

Thanks,

Jeff Landfield
Editor-in-Chief
The Alaska Landmine
907-764-5333
www.alaskalandmine.com



AN IMPORTANT MESSAGE ABOUT REPRESENTATIVE JOSH REVAK

THANK YOU JOSH REVAK!

✓ **VOTED FOR A FULL PFD**

✓ **VOTED FOR A SMALLER BUDGET**

✓ **VOTED FOR SCHOOL FUNDING**

✓ **VOTED FOR A SMALLER GOVERNMENT**

**CALL AND THANK HIM AT:
(907) 302-3809**



THANK YOU REP. JOSH REVAK FOR KEEPING YOUR PROMISES

CALL OR EMAIL REPRESENTATIVE
REVAK AND THANK HIM FOR
KEEPING HIS PROMISES AND
LOOKING OUT FOR YOU!

REPRESENTATIVE.JOSH.REVAK@AKLEG.GOV
(907) 302-3809

PRSR1 STD
U.S. Postage
PAID
Anchorage, AK
Permit No. 89

000000

AN IMPORTANT MESSAGE ABOUT SENATOR MIA COSTELLO

THANK YOU MIA COSTELLO!

✓ VOTED FOR A FULL PFD

✓ VOTED FOR A SMALLER BUDGET

✓ VOTED FOR SCHOOL FUNDING

✓ VOTED FOR A SMALLER GOVERNMENT

CALL AND THANK HER AT: ★

(907) 341-3857

PRSR1 STD
U.S. Postage
PAID
Anchorage AK
Permit No. 69

**THANK YOU SEN. MIA COSTELLO
FOR KEEPING YOUR PROMISES**

**CALL OR EMAIL SENATOR
COSTELLO AND THANK HER FOR
KEEPING HER PROMISES AND
LOOKING OUT FOR YOU!**

**SENATOR.MIA.COSTELLO@AKLEG.GOV
(907) 341-3857**



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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329


MEMORANDUM

May 20, 2019

SUBJECT: Executive Branch Ethics Act restrictions on use of funds for partisan political purpose (Work Order No. 31-LS1006)

TO: Representative Zack Fields
Attn: Tristan Walsh

FROM: Daniel C. Wayne
Legislative Counsel



You have asked whether the governor's recent posting of a paid advertisement on Facebook.com violates ethics law regarding the use of public funds for paid advertising for partisan political purposes. I have attached a copy of the ad you provided to this office with your request.

The applicable ethics law is the Executive Branch Ethics Act (AS 39.52). As a preliminary matter, our advice is not binding on a finder of fact in a matter investigated under AS 39.52. Any person may report a potential ethics violation under AS 39.52.230, or file an ethics complaint under AS 39.52.310(b). Reports of potential ethics violations, under AS 39.52.230, are investigated by a public officer's designated ethics supervisor, who, for the governor, is the Attorney General.¹ However, if an ethics complaint is filed against the governor under AS 39.52.310, the personnel board appoints an outside special counsel to investigate the complaint and recommend findings to the personnel board, and the personnel board makes the final determination.²

The governor is a public officer.³ If a complaint were filed against the governor based on the attached ad, the special counsel and the personnel board would probably consider AS 39.52.120(b), which provides in relevant part:

(b) A public officer may not

...

¹ AS 39.52.960(8).

² AS 39.52.310(c).

³ AS 39.52.960(22).

(6) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes; . . . in this paragraph, "for partisan political purposes"

(A) means having the intent to differentially benefit or harm a

(i) candidate or potential candidate for elective office; or

(ii) political party or group;

(B) but does not include having the intent to benefit the public interest at large through the normal performance of official duties.

The top of the ad proclaims "Sponsored - Paid for by Governor Michael J. Dunleavy." This suggests that state funds were used to pay for the ad; if so, two questions remain: (1) is the ad "for partisan political purposes;" and, (2) does the ad have "the intent to benefit the public interest at large through the normal performance of official duties."

(1) Is the ad for a partisan political purpose?

The body of the ad reads:

The Senate has proposed a full \$3,000 PFD, but sadly *the House Majority* has proposed a \$0 PFD. With just days left in the legislative session, Alaskans need to take immediate action. Use this handy tool to tell lawmakers you want YOUR full \$3,000 PFD - and nothing less. Act now to save your PFD: www.akgov.us/cyl⁴

Although "political party or group" is not defined under AS 39.52, because the house majority is a caucus, the independent counsel and the personnel board may determine that it is a political group.

When terms are undefined in statute, AS 01.10.040(a) directs that they be construed "according to their common and approved usage." The Alaska Supreme Court has said:

Dictionaries provide a useful starting point for determining what statutory terms mean, as they provide the common and ordinary meaning of words. When a popular or common word is used in a statute, but is not defined, the word should be given its common meaning.⁵

⁴ Emphasis added. The online address "www.akgov.us/cyl," listed in the Facebook.com ad is for a webpage that prompts users to enter personal identifying information for the apparent purpose of generating an electronic letter to legislators.

⁵ *Alaskans For Efficient Government, Inc. v. Knowles*, 91 P.3d 273, 276 n. 4 (Alaska 2004), quoting 2A Norman J. Singer, Sutherland Statutory Construction § 47.28 (6th ed. 2000).

The common meaning of "caucus," according to one dictionary, is "a private meeting of leaders or a committee of a political party or faction to decide on policy, pick candidates, etc., esp. prior to a general, open meeting."⁶ In this context, which involves a majority caucus of a house of the legislature, the independent counsel and the personnel board may look to the definition of "caucus" under the Legislative Ethics Act (AS 24.60), although they are not necessarily bound by that definition. The Legislative Ethics Act defines "caucus" as "a group of legislators who share a political philosophy, or have a common goal, and who organize as a group."⁷ Either of these two definitions would support a finding that the house majority is a political group.

(2) Is the ad intended to benefit the public interest at large through the normal performance of official duties?

Although one purpose of the ad may be to benefit the public interest at large, through a permanent fund dividend, does an intention to benefit the public interest supersede the AS 39.52.120(b)(6) prohibition on partisan political use of public funds? And, if so, is use of public funds to pay for a political ad on Facebook.com a normal performance of official duties? As noted in an Attorney General opinion,

[U]nder article IX, section 6 of the Alaska Constitution, "no appropriation of public money [may be] made, or public property transferred . . . except for a public purpose." The use of public resources for a partisan election campaign is not per se prohibited by the public purpose doctrine. However, this office has in past opinions narrowly construed the power of state officials to expend state money or use state property in support of a partisan position in an election campaign. We advised that there are two barriers to those expenditures. In 1980 we wrote,

[t]he first [barrier to the expenditure of public money or property] is that there must be clear and explicit statutory authority to expend public money in support of partisan position The second barrier is the rule that public funds may be expended on political activities only if the government's involvement is fair and neutral.⁸

⁶ *Webster's New World Dictionary of the American Language, Second College Edition.*

⁷ AS 24.60.037(g)(1).

⁸ 1994 *Inf. op. Att'y Gen. (Jan. 1; 663 94 0147)* citing 1980 *Inf. Op. Att'y Gen. (June 11; Pegues)*.

Representative Zack Fields
May 20, 2019
Page 4

Applying this interpretation of the constitutional "public purpose" requirement, the use of public funds for a partisan political purpose is unconstitutional, and therefore not a normal performance of official duties.

Conclusion

Based on the foregoing, if a complaint were filed against the governor related to the attached ad, the special counsel and the personnel board may determine that producing and paying for the ad constitutes a prohibited use of state funds by a public officer, under AS 39.52.120(b)(6) of the Executive Branch Ethics Act.

DCW:mjt
19-243.mjt

Attachment

AT&T LTE

5:30 PM

14% 



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2



Change Record Detail with Description - Ignoring Included Scenarios (355)

Judiciary

Scenario: FY2020 Veto Scenario (16005)
 Component: Appellate Courts (AR C100) (767)
 RDU: Alaska Court System (244)

Change Record Title	Trans Type	Totals	Personal Services	Travel	Services	Commodities	Capital Outlay	Grants, Benefits	Miscellaneous	PFT	Positions PPT	NP
FY20 3% COLA Increases to Align the Judiciary's Employees Salaries with GGU Salary Increases												
	Veto	-110.8	-110.8	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund		-110.8										
This reduces funding added for salaries, and continues following statutory guidelines for exempt employee salaries.												
The State's fiscal reality dictates a reduction in expenditures across all agencies.												
Elimination of Funding Equal to FY2018 State Funded Abortions												
	Veto	-334.7	0.0	0.0	0.0	0.0	0.0	0.0	-334.7	0	0	0
1004 Gen Fund		-334.7										
The Legislative and Executive Branch are opposed to State funded elective abortions; the only branch of government that insists on State funded elective abortions is the Supreme Court. The annual cost of elective abortions is reflected by this reduction.												
The Federal Government also prohibits any federal funds paying for elective abortions.												
Totals		-445.5	-110.8	0.0	0.0	0.0	0.0	0.0	-334.7	0	0	0

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA STATE HOSPITAL AND)
NURSING HOME ASSOCIATION,)
an Alaska non-profit corporation,)

Plaintiff,)

v.)

STATE OF ALASKA,)
DEPARTMENT OF HEALTH)
AND SOCIAL SERVICES,)

Defendants.)

Case No.: 3AN-19-08244CI

AFFIDAVIT OF DONNA STEWARD

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Donna Steward, being duly sworn, states as follows:

1. I am employed in the Commissioner's Office of the Department of Health and Social Services, where I am currently one of two Deputy Commissioners. My title is Deputy Commissioner, Medicaid and Health Care Policy. My current duties include oversight of the Division of Health Care Services, Division of Senior and Disabilities Services, Division of Public Assistance and the Office of Rate Review. I have a bachelor's degree in Economics from the University of Washington and have worked in the field of health care policy and coverage since 1993.

2. I was appointed Deputy Commissioner on January 2, 2019 but have been with the department since December 2015. As the Deputy Commissioner, I provide

For the Senate: http://www.akleg.gov/basis/Committee_Details/31?code=SDHS#tab2_7

16. ASHNHA participated in the legislative process, including providing written testimony on the proposed budget strategies that included the reductions. (See Exhibit F).

17. Finally, we had a number of meetings, calls, or emails with ASHNHA and other providers beginning April through June regarding the cost containment strategies, including the rate reduction and inflation freezes.

18. The department discussed implementing these change through both non-emergency and emergency regulations. These options were discussed with DHSS leadership and we consulted with the Department of Law before ultimately deciding to pursue these changes via emergency regulations. In coming to that decision the commissioner and his team considered not only the scope of the budget cuts and how quickly we could start achieving savings, but what we could do that would have the least amount of impact to providers and recipients. The Medicaid program is a joint federal/state program that requires funding from both parties. The general split of funding is 50/50 but depending on the recipient or services provided, more funding may be available from the federal side, that is, more federal money is allocated to the split than state dollars. Because of the significant federal investment in Medicaid, when DHSS makes changes to its Medicaid program, we work with the federal government on those changes. The “contract” we have with the federal government is called the State Plan, and when new regulations are implemented that change the state Medicaid

program, those same changes must be changed and/or added to the State Plan, which is then ultimately approved or denied by the federal government (CMS). Changes are submitted and filed as a State Plan Amendment or a SPA.

19. As a general matter, we can amend our State Plan at any time, but we can only claim reimbursement for changes that have a financial impact to the program back to the first day of the quarter that the State Plan amendment is submitted. Therefore, if the department wants to claim for July 1, 2019, the SPA must be submitted and approved by the end of the first fiscal quarter, which is the end of September. The department cannot submit a SPA based on hypothetical ideas on processes, so we must have a final regulation in order to submit a SPA. This means a SPA cannot be submitted until a regulation has been formally adopted. The SPA process is more fully explained in the CMS document at Exhibit G.

20. Because we utilized emergency regulation process, the department is on track to submit the required SPAs by the last day of the quarter in which the rate adjustments were implemented. It takes at least 60 days to implement a SPA after the regulation approval process. We will be submitting our SPA at the end of August. The timing of that submission relates to the end of federally required tribal consultation, which concludes in August. Had we used the non-emergency regulation process—which I have been advised would have taken at least 180 days from start to finish—we could not have submitted the SPA until the filing of the regulation with the lieutenant governor. Using a “best case scenario” of 180 days, our SPA would not have been

submitted until well into the second quarter, therefore, DHSS could not implement the rate changes and savings could not be achieved until October 1, 2019.

21. The motion for preliminary injunction argues that the budget reductions are all being borne by the providers. This is simply not true. Many other divisions within DHSS are taking cuts, and not all of the budget reductions are being captured solely by these rate reductions. (See Exhibit A). In fact, while Medicaid has taken the brunt of the reductions, the total reduction under these regulations for all providers is estimated to be close to \$32 million. Inpatient hospitals impacted by these regulations, account for \$21.6 million of the \$32 million.

22. The emergency regulations were adopted on the same day that the governor issued his vetoes to the operating budget. The department was unaware that the governor would be reducing the Medicaid budget by an additional \$50 million when these regulations were adopted. The additional cuts to Medicaid due to the governor's vetoes on July 28, 2019, are currently being evaluated. Those additional cuts are not, and were not, a part of these emergency regulations.

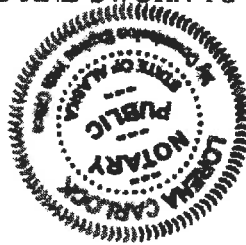
23. As part of the exercise in evaluating how to absorb the budget cuts to the programs we have also engaged in various budget exercises to see how long the current appropriation will last if none of our budget strategies can be implemented. I have been advised by our budget unit that our best estimate is that if we do nothing, the Medicaid program will run out of money in April 2020. If this happens, it would be catastrophic as no providers will be paid, no services will be rendered, and no one will be getting the

federal law. A sample of one of the letters that was sent to nursing facility providers can be found at Exhibit J.

Dated: 8/2/2019

Donna Steward
Donna Steward, Deputy Commissioner
Alaska Department of Health
and Social Services

SUBSCRIBED AND SWORN TO before me on 8/2/2019.



L Carlock
Notary Public in and for Alaska
My commission expires with office.



LAWS OF ALASKA

2019

FIRST SPECIAL SESSION

Source
CCS SSHB 39

Chapter
No.
1

AN ACT

Making appropriations for the operating and loan program expenses of state government and for certain programs; capitalizing funds; amending appropriations; making supplemental appropriations and reappropriations; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

	Appropriation	General	Other
	AllocationsItems Funds	Funds	
General Relief/Temporary	6,401,100		
Assisted Living			
Commission on Aging	214,500		
Governor's Council on	1,376,500		
Disabilities and Special	1,419,700		
Education			
Departmental Support Services	42,942,100	15,527,500	27,414,600
Public Affairs	1,745,800		
Quality Assurance and Audit	990,800		
Commissioner's Office	4,138,800		
Administrative Support	13,534,500		
Services			
Facilities Management	960,900		
Information Technology	17,221,300		
Services			
HSS State Facilities Rent	4,350,000		
Human Services Community Matching	1,387,000	1,387,000	
Grant			
Human Services Community	1,387,000		
Matching Grant			
Community Initiative Matching Grants	861,700	861,700	
Community Initiative	861,700		
Matching Grants (non-			
statutory grants)			
Medicaid Services	2,020,655,400	416,346,300	1,604,309,100
	2,097,659,900	493,350,800	

It is the intent of the legislature that long-term care facilities be exempt from Medicaid provider rate reductions.

No money appropriated in this appropriation may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The money appropriated for Health and Social Services may be expended only for mandatory services required under Title XIX of the Social Security Act and for optional services offered by the state under the state plan for

1	Appropriation		General	Other
2	Allocations	Items Funds	Funds	

3 medical assistance that has been approved by the United States Department of Health and
4 Human Services.

5 It is the intent of the legislature that Critical Access Hospitals and hospitals with the dual
6 federal designation of Sole Community Hospital and Rural Referral Center be exempt from
7 the five percent Medicaid rate reduction proposed by the Department of Health and Social
8 Services.

	2,020,655,400
9 Medicaid Services	2,070,655,400

10 It is the intent of the legislature that the department work with the statewide professional
11 hospital association to develop strategies and methodologies for implementation of hospital
12 diagnosis related groups, acuity-based skilled nursing facility rates, rate reductions, and
13 timely filing provisions to mitigate unintended consequences.

14 The department shall submit quarterly progress reports on cost containment efforts to the co-
15 chairs of the House and Senate Finance Committees and the Legislative Finance Division.

16	Adult Preventative Dental	27,004,500
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17 ~~Medicaid Services~~

18 It is the intent of the legislature that the Department of Health and Social Services continue to
19 provide Adult Preventative Dental Medicaid Services.

20 * * * * *

21 * * * * * Department of Labor and Workforce Development * * * * *

22 * * * * *

23	Commissioner and Administrative	18,765,300	5,768,300	12,997,000
24	Services			

25	Commissioner's Office	989,700
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26	Workforce Investment Board	474,900
----	----------------------------	---------

27	Alaska Labor Relations	537,200
----	------------------------	---------

28 Agency

29	Management Services	3,907,300
----	---------------------	-----------

30 The amount allocated for Management Services includes the unexpended and unobligated
31 balance on June 30, 2019, of receipts from all prior fiscal years collected under the
32 Department of Labor and Workforce Development's federal indirect cost plan for
33 expenditures incurred by the Department of Labor and Workforce Development.



LAWS OF ALASKA

2019

SECOND SPECIAL SESSION

Source

SCS CSHB 2001(FIN) am S

Chapter

No.

2

AN ACT

Making appropriations for the operating and loan program expenses of state government and for certain programs; capitalizing funds; making supplemental appropriations, reappropriations, and other appropriations; making appropriations for the operating and capital expenses of the state's integrated comprehensive mental health program; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

		Appropriation	General	Other
	Allocations	Items	Funds	Funds
1				
2				
3	Senior Benefits Payment Program	20,786,100	20,786,100	
4	Senior Benefits Payment	20,786,100		
5	Program			
6	Senior and Disabilities Services	49,100		49,100
7	Governor's Council on	49,100		
8	Disabilities and Special			
9	Education			
10	Human Services Community Matching	1,387,000	1,387,000	
11	Grant			
12	Human Services Community	1,387,000		
13	Matching Grant			
14	Community Initiative Matching Grants	861,700	861,700	
15	Community Initiative	861,700		
16	Matching Grants (non-			
17	statutory grants)	18,730,900	18,730,900	
18	Medicaid Services	77,004,500	77,004,500	
19	Medicaid Services	50,000,000		
20	Adult Preventative Dental	27,004,500		
21	Medicaid Services			
22	*****	*****		
23	***** Department of Law *****			
24	*****	*****		
25	Criminal Division	533,500	533,500	
26	First Judicial District	80,000		
27	Second Judicial District	533,500		
28	Third Judicial District:	631,200		
29	Anchorage	80,700		
30	Third Judicial District:	92,000		
31	Outside Anchorage			
32	Fourth Judicial District	82,500		
33	Criminal Appeals/Special	91,900		

Change Record Detail with Description - Ignoring Included Scenarios (355)

Department of Health and Social Services

Scenario: FY2020 HB2001 Veto Scenario (16158)
 Component: Adult Preventative Dental Medicaid Svcs (AR H106) (28339)
 RDU: Medicaid Services (595)

Change Record Title	Trans Type	Totals	Personal Services	Travel	Services	Commodities	Capital Outlay	Grants, Benefits	Miscellaneous	PFT	Positions PPT	NP
Veto Reverse Eliminate Adult Dental Medicaid Benefit												
	Veto	-27,004.5	0.0	0.0	0.0	0.0	0.0	-27,004.5	0.0	0	0	0
1003 G/F Match		-27,004.5										
Eliminate this optional Medicaid service. The State's current fiscal reality requires minimizing general fund spending in support of optional services to ensure adequate funding for federally-required Medicaid services. Emergency dental services will remain covered.												
The funding for this program was previously vetoed in HB 39. After the veto in HB 39, a question was raised regarding whether the veto in HB 39 should be interpreted to provide that the entire \$27 million reduction resulting from the elimination of funding for this program should be allocated to the general fund rather than split between the general fund and federal funds. The Department of Law advised the Office of Management and Budget that HB 39 should be interpreted to accomplish its intent, which was to eliminate funding for the program. In order to implement that intent, the reduction in the general fund appropriation would not be \$27 million but instead would be \$8,273,600 with the remainder reduced from federal funding because the program is funded by a mix of state and federal funds. The Department of Law advised that its conclusion was based on the clear intent of the legislation as disclosed on the face of the bill which was to veto funding for the program and as disclosed in the veto message which provided that the veto would result in a reduction in spending of state and federal funds (not just state funds) of \$18,730,900 in federal receipts and \$8,273,600 in general fund.												
It is noted that HB 2001 includes only general fund appropriations for Medicaid funding, including the adult dental program. It is clear from the appropriation in HB 2001 that the legislature intended to restore what it viewed as all the general fund money I previously vetoed in HB 39. Although it is the position of this administration, upon advice from Department of Law, that my prior veto included approximately \$18,730,900 million in federal funds, I have reduced the general fund appropriation in HB 2001 to eliminate all funding for the adult preventative dental program and maintain the \$18,730,900 in general funds that were never intended to be vetoed in HB 39. This action resolves any question regarding the prior veto of funding for the program and ensures the original intent of my line-item veto is fulfilled. Namely, \$27,004,500 consisting of both general funds and federal funds has been stricken with the intent that all funding for the adult preventative dental program be eliminated.												
Totals		-27,004.5	0.0	0.0	0.0	0.0	0.0	-27,004.5	0.0	0	0	0